this case or that he had prejudged this case in any way. Plaintiffs did not contend that Justice Karmeier was hostile to Plaintiffs or to Plaintiffs' counsel. Nor did Plaintiffs assert that Justice Karmeier had any pecuniary interest or other direct, substantial, or personal interest in the outcome of this case that would create an appearance of impropriety.

Plaintiffs instead based their non-participation motion on allegations regarding contributions made in support of Justice Karmeier's campaign for the Illinois Supreme Court in a hotly contested race in which each side raised more than $4 million. Plaintiffs claimed that (i) State Farm was responsible for $350,000 in "direct donations" and "more than a million dollars more in indirect donations" to Justice Karmeier's campaign and (ii) State Farm was supposedly a "major player in the Karmeier campaign, from start to finish." Pet. App. 230, 259, 299. *See also* Pet. at 8, 19.

Plaintiffs' allegations of "massive" contributions made directly or indirectly by State Farm had no basis in fact and were unsupported by the record. As State Farm showed in its submissions to the Illinois Supreme Court, Plaintiffs' allegations were based on their assertion (for which they provided no plausible basis or factual support) that State Farm was somehow the moving force behind every contribution made by any civic or business organization to which State Farm had any connection whatsoever. *See* Pet. App. 276. In response, State Farm established the following facts:

- State Farm itself made *no* contributions to Justice Karmeier's campaign either directly or through JUSTPAC[4] or any other organization.[5] Resp. App. 32a n.3.

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[4] JUSTPAC is a political action committee of the Illinois Civil Justice League. *See infra* at 9.

[5] As a matter of long-standing corporate policy, State Farm does not make campaign contributions. Plaintiffs submitted no document or exhibit to the Illinois Supreme Court that showed any such contribution to Justice Karmeier's campaign. The absence of any such contribution is

- Plaintiffs' exhibits showed that a small number of State Farm employees and relatives of State Farm employees made individual contributions to Justice Karmeier's campaign in relatively modest amounts ranging from $200 to $300, totaling only $1850.[6] Pet. App. 250, 256-58, 300.

- Plaintiffs improperly attributed to State Farm campaign contributions by groups such as the U.S. Chamber of Commerce (which has approximately 154,000 direct members) and the Illinois Chamber of Commerce (which has approximately 2,800 members). Plaintiffs based such attributions upon the mere facts that State Farm was one among the many members of such organizations and that a State Farm

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confirmed by the public records of campaign contributions maintained by the Illinois Board of Elections.

[6] Professor Painter characterized the contributions by State Farm's employees to Justice Karmeier's campaign as "*de minimis*." Painter Aff. ¶ 4 (Resp. App. 3a). Plaintiffs' exhibits also showed that a small number of State Farm employees and relatives of State Farm employees made individual contributions to JUSTPAC in relatively modest amounts ranging from $250 to $1000, totaling only $5050. Pet. App. 243, 250, 256-59. In total, Plaintiffs identified approximately 18 State Farm employees or relatives of State Farm employees -- out of the tens of thousands of State Farm employees in Illinois -- as having contributed to Justice Karmeier's campaign or to JUSTPAC. State Farm's outside counsel also did not make "massive" contributions, as Plaintiffs imply. *See* Pet. at 7, 18. In their moving papers below, Plaintiffs listed only a $500 contribution to Justice Karmeier's campaign from Marci Eisenstein, one of the trial lawyers for State Farm in this case; a $5000 contribution from Mayer, Brown, Rowe & Maw LLP, one of the largest law firms in Illinois which represents many corporate defendants and which represented State Farm before the Illinois intermediate appellate court in this case; and a $1950 contribution from Heyl, Royster, Voelker & Allen, the law firm of another of the trial lawyers for State Farm, Robert H. Shultz. Pet. App. 300. Plaintiffs cited no facts to show that these contributions were in any way intended to influence Justice Karmeier in this case. Moreover, public records show that Plaintiffs' counsel have made generous contributions to the campaign committees of many of the Justices of the Illinois Supreme Court, as well as to Justice Karmeier's opponent, Gordon Maag, and to other judges' campaigns throughout Illinois. Pet. App. 270.

employee serves on the board of the U.S. Chamber (which has over 100 directors) and that another State Farm employee serves on the board of the Illinois Chamber (which has 62 directors). *See* Pet. at 8; Pet. App. 279, 301; Resp. App. 22a.[7] Contrary to Plaintiffs' contentions, these facts do not provide a legal or factual basis for inferring that these organizations were "front groups" for State Farm (Pet. App. 305) or concluding that campaign contributions made by these organizations should be regarded in any way as coming from State Farm.

- Plaintiffs made similar assertions regarding contributions made by the American Tort Reform Association ("ATRA"),[8] the Illinois Coalition for Jobs, Growth and Prosperity, and the Illinois Insurance Political Committee. *See* Pet. at 8 & n.3. The fact that "State Farm was a member of and contributor to" these groups (*id.*) -- along with many other companies -- does not transform the campaign contributions made by these groups into State Farm contributions or lend support to Plaintiffs' motion to disqualify Justice Karmeier. *See* Pet. App. 277. Moreover, State Farm simply pays dues to these groups and makes no special contributions to these groups for campaign purposes. Indeed, State Farm's contributions to the Illinois Coalition for Jobs, Growth and Prosperity are explicitly earmarked as not to be used for campaign contributions, but to be limited to educational, public relations, and legislative efforts.

- Plaintiffs claimed that contributions to the Karmeier campaign by a few of the many companies and public interest groups (and the law firms of the lawyers representing

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[7] The members of the U.S. Chamber include businesses and professional associations of every size, in every sector, and from every region of the country. The members of the Illinois Chamber include small and large businesses, local chambers of commerce, and a variety of trade and professional organizations.

[8] ATRA's members include more than 300 businesses, corporations, associations, and professional firms across the country. Pet. App. 277.

them) that submitted *amicus* briefs before the Illinois Supreme Court should somehow be attributed to State Farm.[9] *See* Pet. at 8; Pet. App. 300-01. Such groups regularly submit amicus briefs in many of the major litigations affecting businesses in Illinois and around the country. Plaintiffs did not and could not show that *amici* such as the U.S. and Illinois Chambers of Commerce, which contributed to Justice Karmeier's campaign, had a financial interest in the outcome of this case or that there were any facts to support Plaintiffs' assertions that State Farm was somehow behind those contributions.[10]

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[9] Sixteen *amicus* briefs, addressing various aspects of the important issues of class certification, insurance, and public policy raised by this case, were submitted to the Illinois Supreme Court in support of State Farm's appeal. The diverse *amici* reflected the breadth of the public and private interests adversely impacted by the judgment in this case. The *amici* included the National Association of Insurance Commissioners, the Illinois Department of Insurance, the National Conference of Insurance Legislators and the American Legislative Exchange Council, Public Citizen, Inc. and the Center for Auto Safety, the Illinois Manufacturers' Association, the Washington Legal Foundation, the Alliance of American Insurers, Allstate Insurance Company, the Chamber of Commerce of the United States of America, the Illinois Chamber of Commerce, Citizens for a Sound Economy Foundation, the Superintendent of the Ohio Department of Insurance, the Insurance Departments of North Carolina and the District of Columbia, the Insurance Divisions of Nevada and Colorado, General Motors Corp. and Ford Motor Co., and Government Employees Insurance Company.

[10] Plaintiffs, in an effort to inflate the amount of contributions that they alleged should be attributed to State Farm, also included, in their pleadings in the Illinois Supreme Court, contributions by companies such as PPG Industries and Dana Corporation. Pet. App. at 249. With regard to PPG, Plaintiffs claimed that State Farm had a "major interest" in PPG. *Id.* In fact, as State Farm documented in its submissions to the Illinois Supreme Court, PPG is a publicly traded company, 59 percent of its stock is held by mutual funds, and State Farm is not listed among its major holders. Resp. App. 31a. With regard to Dana Corporation, Plaintiffs attached an exhibit from the company's website showing it made non-OEM parts and claimed that "one can only conclude that Dana Corporation is a major supplier" to State Farm of non-OEM parts of the kind at issue in

In short, Plaintiffs' allegations of "massive" contributions made directly or indirectly by State Farm are entirely unfounded. In addition, most of the contributions by *amici*, lawyers and others that Plaintiffs cited in support of their motion were made in the summer of 2004. Oral argument before the Illinois Supreme Court in this case took place in May 2003, and the Court's opinion could have been expected to issue at any time thereafter in 2003 or 2004. No contributor could have reasonably anticipated that this case would still be pending into 2005 so as to allow participation by the newly elected Justice.

Plaintiffs' allegations regarding State Farm's supposed role as a "major player" (Pet. App. 259) in Justice Karmeier's election campaign were and remain equally misleading. Plaintiffs' claims that State Farm played a role in Justice Karmeier's campaign are based not on activities by State Farm itself, but on the alleged connections between Edward Murnane (the executive director of the Illinois Civil Justice League ("ICJL")[11] and treasurer of JUSTPAC, a separate political action committee formed in 1994 by the ICJL) and Justice Karmeier's campaign. Plaintiffs improperly attempt to attribute to State Farm the activities of Mr. Murnane and the ICJL and JUSTPAC, asserting that Mr. "Murnane and his State Farm-funded and supported groups . . . recruited Justice Karmeier to run" and "financed his race with massive contributions." Pet. at 7. Contrary to the impression Plaintiffs have attempted to convey in their Petition (*id.*), Ed Murnane

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this case. Pet. App. 249. In fact, the website showed that Dana made brakes, brakes parts, chassis, and other engine parts, none of which were at issue in this case. Resp. App. 31a.

[11] The ICJL was formed by the Illinois Business Round Table in 1992, long before Justice Karmeier's campaign. The ICJL's members and supporters include many of the major businesses and professional associations of Illinois, including many of Illinois' largest companies, such as Caterpillar, Inc., Motorola, CNA Insurance, Deere & Co, Brunswick, Allstate, and Kraft General Foods. Pet. App. 278 n.10.

is not and has never been a State Farm employee or agent and has no special relationship with State Farm. The ICJL and JUSTPAC did not act as "State Farm-funded and supported groups" in supporting Justice Karmeier's election. State Farm's only "funding" of the ICJL consisted of paying yearly membership dues to the organization -- just as the numerous other companies and businesses that were members of the ICJL did. State Farm has never been a member of JUSTPAC and has never provided funding or contributions of any kind to JUSTPAC.

Plaintiffs also distorted the facts in claiming that "now-Justice Karmeier, his supporters Ed Murnane and Bill Shepherd," the ICJL and JUSTPAC "were well aware of the pendency of this lawsuit." Pet. at 7. Plaintiffs showed no evidence of any kind that Justice Karmeier himself expressed any opinion regarding this lawsuit before or during his campaign or discussed it with Mr. Murnane or anyone else. As State Farm pointed out before the Illinois Supreme Court, the fact that Mr. Murnane was aware of this case and expressed an opinion about it is not improper and has no relevance to Justice Karmeier's participation in the decision in this case. Pet. App. 281-82. Mr. Murnane, although supportive of Justice Karmeier, was not Justice Karmeier's campaign manager or campaign finance chairman and was not employed by Justice Karmeier's campaign.

Plaintiffs made a variety of allegations regarding State Farm employee Bill Shepherd. Before the Illinois Supreme Court, Plaintiffs claimed with no basis whatsoever that Bill Shepherd "recruited" Justice Karmeier to run for the Illinois Supreme Court. Pet. App. 251. In fact, Bill Shepherd has met Justice Karmeier only four times, all at large receptions -- the first three after Justice Karmeier's victory in the Republican primary and the fourth after his election. Moreover, contrary to Plaintiffs' wholly unsupported assertions (Pet. at 7), Bill Shepherd was in no way "instrumental" in founding the ICJL or JUSTPAC.

In their Petition, Plaintiffs also quote selectively and out of context an editorial from the *St. Louis Post Dispatch* on the election. In fact, contrary to Plaintiffs' contention, that editorial did not "suggest[] that Justice Karmeier might be tempted to 'do favors for the interests that lavished millions on his campaign.'" Pet. at 9. Rather, while the editorial was critical of the judicial election process and suggested that it "should be replaced with a merit-selection system," the editorial specifically rejected the notion that Justice Karmeier would be less than honest and impartial, stating that "[g]iven Judge Karmeier's record in the lower courts, we believe he will proceed with integrity." *See* Ex. 9 to Plaintiffs' Mem. in Support of Motion for the Conditional Non-Participation.[12]

REASONS FOR DENYING THE WRIT

Plaintiffs urge this Court to grant review and hold "that recusals are guaranteed by the Due Process Clause when campaign contributions of this magnitude are made by a party to a pending lawsuit to a judge sitting on the case." Pet. at 25. This case is an improper vehicle for this Court even to consider such a rule. State Farm made no contributions to

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[12] Moreover, the editorial drew no connection between the campaign and this case. Rather, the editorial explained that the election campaign between Justice Karmeier and his opponent

> also involve[d] an effort to bring evenhandedness to the plaintiffs' lawyers' paradise that is the Madison County courts. For decades, plaintiffs' attorneys in Madison County have padded the election coffers of local judges with little push-back from business . . . . Such friendly judges, combined with the county's reputation for generous juries, make it a magnet for lawsuits from all over the country, most naming big businesses as defendants. It has also scared the bejabbers out of medical malpractice insurance companies, contributing to sky-high malpractice rates that have set off an exodus of doctors from the Metro East. That, more than anything else, probably explains why the Republican Karmeier won by a small margin in overwhelmingly Democratic Madison County, as well as across Southern Illinois.

Id.

Justice Karmeier's campaign. Moreover, at the time of the contributions made by others to Justice Karmeier's campaign, which Plaintiffs attempt to attribute to State Farm, Justice Karmeier was not a judge "sitting on the case." Justice Karmeier's participation in this case could have begun only after his election to the Illinois Supreme Court and his taking office. As such, the rule Plaintiffs ask this Court to fashion would have no applicability to the present case. Furthermore, the rule Plaintiffs seek hardly requires recourse to the Due Process Clause. On the contrary, ethical codes and rules governing judicial and attorney conduct in election campaigns more than satisfactorily rein in actual and potential abuses occasioned by contributions by a party to a pending lawsuit to a judge sitting on the case.

As this Court recently observed, "the Due Process Clause of the Fourteenth Amendment . . . has coexisted with the election of judges ever since it was adopted." *Republican Party of Minnesota v. White*, 536 U.S. 765, 783 (2002).[13] The Court has recognized both that judges are entitled to a strong presumption of honesty and integrity and that most matters of judicial disqualification do not rise to a constitutional level. The Court has repeatedly held that due process requires recusal only in those rare cases in which a judge has a direct, personal, substantial, or pecuniary interest in the outcome of a case. Plaintiffs did not and could not show that Justice Karmeier had any such disqualifying interest in this case. Indeed, Justice Karmeier's participation in the decision of the Illinois Supreme Court was entirely consistent with this Court's due process rulings.

Courts around the country have rejected the essential notion animating Plaintiffs' argument that contributions to a judge's campaign committee from lawyers or litigants create

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[13] The Illinois Constitution was amended in 1848 to provide for public election of the justices of the Illinois Supreme Court. Ill. Const. of 1848, art. V, § 3.

bias or the appearance of impropriety. Indeed, Plaintiffs cite no case from any state that requires recusal where, as here, judicial campaign contributions were made before the judge in question began his or her participation in the case. Moreover, Plaintiffs' claim that Illinois, in conflict with other states, has adopted a blanket rule that campaign contributions, no matter how massive, "are never a basis for recusal" (Pet. at 19) is based solely on Plaintiffs' unfounded supposition as to why the Illinois Supreme Court refused to require Justice Karmeier's recusal. The Illinois Supreme Court issued no written opinion and may simply have concluded, based on State Farm's submissions, that Plaintiffs' allegations of improper contributions lacked factual support or were downright frivolous. In short, there are no conflicts arising from Justice Karmeier's participation in this case that could require resolution by this Court.

No less significantly, the "holding" Plaintiffs seek from this Court would intrude on the time-honored prerogative of the states to adopt, as each legislature or rule-making body deems appropriate, rules and procedures to cabin potential improprieties in judicial election campaigns. Moreover, the absolute rule Plaintiffs seek would be incompatible with this Court's due process jurisprudence, which recognizes that due process is "flexible" and calls for such procedural protections as the particular situation demands. Plaintiffs' proposed rule would eliminate the necessary consideration in this context not only of the specific circumstances of contributions and their timing, but also of the effect of the particular recusal on the judicial system in question -- which is, of course, of greater moment, where as here the recusal of a justice of a state's high court is sought. Moreover, the recusal rule sought by Plaintiffs also implicates serious First Amendment concerns, because it could significantly chill the willingness of attorneys and potential litigants to support the judicial candidate(s) of their choice out of fear that they would later be unable to appear before, or have their case adjudicated by, a particular judge.

Accordingly, for these reasons and those set forth below, Plaintiffs' petition for certiorari should be denied.

I. JUSTICE KARMEIER'S PARTICIPATION IN THE ILLINOIS SUPREME COURT'S DECISION IN THIS CASE FULLY COMPORTED WITH DUE PROCESS

This Court has long recognized that there is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Accordingly, the Court has repeatedly held that due process requires recusal only in those rare cases in which a judge has a "'direct, personal, substantial, [or] pecuniary interest'" in the outcome of a case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986) (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)); *see also Connally v. Georgia*, 429 U.S. 245, 250 (1977); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). Plaintiffs in this case did not and could not show that Justice Karmeier had any such disqualifying interest. Indeed, his participation in the Illinois Supreme Court's decision in this case was wholly consistent with due process.

This Court has made it clear that "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948); *see also Tumey*, 273 U.S. at 523 ("[M]atters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion."); *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard."). As the Court stated in *Bracy*, the due process "floor" is "a 'fair trial in a fair tribunal,' before a judge with *no actual bias against* the defendant *or interest in the outcome of* his particular case." 520 U.S. at 904-05 (emphasis added) (quoting *Withrow*, 421 U.S. at 46) (citations omitted); *see also White*, 536 U.S. at 775-76 (the "impartial-

ity" required by due process in the judicial context "is the lack of bias for or against either *party* to the proceeding") (emphasis in original).

This Court's decisions in *Aetna* and other cases have held that due process required recusal where (in marked contrast to this case) a judge had a clear financial or personal stake in the result of a case. *See Aetna*, 475 U.S. at 822-24 (due process required disqualification of state supreme court justice because he had a "direct, personal, substantial, [and] pecuniary interest" in entering a ruling that would "enhanc[e] both the legal status and the settlement value of" his own pending lawsuit) (internal quotation marks and citation omitted); *Ward*, 409 U.S. at 59-60 (due process violated where mayor derived village finances from fines imposed in mayor's court); *In re Murchison*, 349 U.S. 133, 134-39 (1955) (judge violated due process where he served as a "one-man grand jury" and then presided over the criminal trial of the defendant he had prosecuted); *Offutt v. United States*, 348 U.S. 11, 14 (1954) (judge should not have "[sat] in judgment upon misconduct of counsel where the contempt charged [was] entangled with the judge's personal feeling against the lawyer"); *Tumey*, 273 U.S. at 523, 535 (due process violated where mayor trying criminal cases had both "a direct pecuniary interest in" convicting defendants and an "official motive to convict" because the fines imposed provided the mayor's compensation and filled the village coffers); *cf. White*, 536 U.S. at 782-83 (indicating that due process does not require recusal based on a judge's prior announcement of legal or political views during a judicial campaign).

Plaintiffs' reliance in their Petition on the cases cited above is misplaced because there is indisputably no similar disqualifying interest here. Justice Karmeier had no pecuniary stake in the outcome of this case, like the judges in *Aetna*, *Ward*, and *Tumey*. He also had no discordant dual role, like the judge/prosecutor in *In re Murchison* or the judge/municipal fundraisers in *Ward* and *Tumey*. In addition, he had no personal entanglement with or hostility towards a

party to the case, like the judge in *Offutt*. Plaintiffs' general and speculative allegations of bias based on Justice Karmeier's receipt of campaign contributions from business and civic organizations before he was elected to the Illinois Supreme Court simply cannot establish a constitutional violation. *Cf. Aetna*, 475 U.S. at 821 (holding that appellant insurer's "allegations of bias and prejudice on [the] general basis" that an Alabama Supreme Court justice was frustrated with and hostile to insurance companies -- as revealed by the judge's deposition testimony in his own pending suit against another insurance company -- were "insufficient to establish any constitutional violation").[14]

Furthermore, the alleged "biasing influences" to which Plaintiffs refer -- campaign contributions from organizations whose numerous members include State Farm and modest contributions from a small number of State Farm employees -- are not only purely speculative but also "'too remote and insubstantial to violate . . . constitutional constraints.'" *See id.* at 826 (citation omitted). In *Aetna*, this Court rejected an insurance company's due process challenge to the participation of the other Alabama Supreme Court justices who were all members of a plaintiff class in a second action against another insurer brought by the justice whom the Court held should have been disqualified. *Id.* at 825-27. Although the justices may have had a "slight pecuniary interest" in ruling against the appellant, the Court found it "impossible to characterize that interest as 'direct, personal, substantial, [and] pecuniary'" because it was "highly speculative and contingent," especially given that no class had yet been certified. *Id.* at 825-26 (citation omitted). The absence of a disqualify-

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[14] *See also Cheney v. United States Dist. Ct.*, 541 U.S. 913, 914 (2004) (Scalia, J.) (Mem. on motion to recuse) ("The decision whether a judge's impartiality can "'reasonably be questioned"' is to be made in light of the facts as they existed, and not as they were surmised or reported.") (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (Rehnquist, C.J.) (opinion respecting recusal)).

ing interest is even clearer in this case. As discussed above, there is no plausible basis or factual support for Plaintiffs' contention that State Farm was the moving force behind every contribution to Justice Karmeier's campaign made by any civic or business organization or individual to which it had any connection.

Nor does Plaintiffs' effort to obscure the absence of any disqualifying interest by focusing on an alleged "appearance of impropriety" in Judge Karmeier's participation (*see, e.g.*, Pet. at 9, 16, 19) find support in this Court's due process decisions. As the Third Circuit recently held, no decision of this Court "has held or clearly established that an appearance of bias on the part of a judge, without more, violates the Due Process Clause." *Johnson v. Carroll*, 369 F.3d 253, 262 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1639 (2005); *accord Callahan v. Campbell*, 427 F.3d 897, 928-29 (11th Cir. 2005); *Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363, 1371-72 (7th Cir. 1994) (en banc). In *Johnson*, the Third Circuit acknowledged that an "appearance of impropriety" test may apply in cases involving the *federal recusal statute*, which requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), but concluded that appearance alone -- without evidence of a disqualifying interest -- does not trigger the Due Process standard. 369 F.3d at 260-62. Other circuits have similarly distinguished the *statutory* standard for recusal of federal judges from the *constitutional* standard. *See United States v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003) (federal recusal statute "reaches farther than the due process clause"); *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990) ("[T]his additional, systemic concern for avoiding the appearance of impropriety . . . makes the section 455 standard for disqualification more demanding than that imposed by the Due Process Clause."); *Hardy v. United States*, 878 F.2d 94, 97 (2d Cir. 1989) ("We do not think that section 455(a)'s appearance of impropriety standard is mandated by the Due Process Clause"); *S. Pac. Commc'ns Co. v.*

Am. Tel. & Tel. Co., 740 F.2d 980, 990 n.9 (D.C. Cir. 1984) (federal recusal statutes "establish a more stringent standard for disqualification than is required by the right to a fair trial guaranteed by the due process clause").

The Seventh Circuit has similarly held that "bad appearances alone do not require disqualification" under the due process clause and that "only a strong, direct interest in the outcome of a case is sufficient to overcome [the] presumption of [a judge's] evenhandedness." *Del Vecchio*, 31 F.3d at 1372-74 (citing *Aetna*, *Tumey*, and *Ward*, *inter alia*, to "illustrate this point"); *see also id.* at 1392 (Easterbrook, J., concurring) ("An 'appearance' of impropriety alone has never led the Supreme Court to find that a party did not receive due process of law."). As Judge Easterbrook stated in his concurrence in *Del Vecchio*, "disqualification for 'appearance of impropriety' is a subject for statutes, codes of ethics, and common law, rather than a constitutional command." *Id.* at 1391; *see also id.* at 1372 n.2 (majority opinion; citing and agreeing with Judge Easterbrook's "detailed historical analysis" which "support[s] the position that the Supreme Court has never rested due process on appearance").[15]

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[15] Plaintiffs' reliance on *dicta* in *Stretton v. Disciplinary Board of Supreme Court of Pennsylvania*, 944 F.2d 137 (3d Cir. 1991), and *In re Mason*, 916 F.2d 384 (7th Cir. 1990), in support of their appearance argument (Pet. at 17), is improper for multiple reasons. Neither case discussed the due process standard for judicial disqualification. *Stretton* upheld a provision of a state judicial code prohibiting judicial candidates from announcing views on disputed legal or political issues, 944 F.2d at 144, like that subsequently held unconstitutional by this Court in *White*, 536 U.S. at 788. *In re Mason* involved the federal recusal statute, not the constitutional standard, and, in the portion quoted by Plaintiffs, stated only that an appearance of impropriety might be created if an attorney were to give "significant financial support to the judge's campaign committee *while the judge was on the bench*." 916 F.2d at 387 (emphasis added). There is no allegation or evidence that Justice Karmeier received any financial support from a party or its attorney while on the bench of the Illinois Supreme Court. Justice Karmeier participated in this case only after his campaign had ended. In addition, as discussed above, both

Just as the due process right to an impartial court does not require recusal based on a judge's legal or policy predispositions, or the announcement of those predispositions during his campaign, *see White*, 536 U.S. at 782-83, it should not warrant recusal based solely on the contributions his campaign committee received, in compliance with the law, before his election. Because this Court's due process decisions comport with Justice Karmeier's participation in the decision below, the Petition should be denied.

II. THE ILLINOIS SUPREME COURT'S DENIAL OF PLAINTIFFS' PETITIONS FOR RECUSAL PRESENTS NO INCONSISTENCY OR CONFLICT WITH THE JURISPRUDENCE OF THE HIGH COURTS OF OTHER STATES

Plaintiffs urge this Court to grant certiorari in this case based upon purported conflicts between the Illinois Supreme Court's denial of Plaintiffs' motion for non-participation and petition for rehearing and decisions by other state high courts regarding due process concerns arising from campaign contributions to judicial elections. The purported conflicts claimed by Plaintiffs are based on Plaintiffs' contention that the Illinois Supreme Court's refusal to require the disqualification of Justice Karmeier means that Illinois has adopted a blanket rule that lawful campaign contributions -- no matter how supposedly massive -- "are never a basis for recusal." Pet. at 19. Plaintiffs have no basis whatsoever for claiming that such a rule has been adopted by the Illinois Supreme Court. Significantly, the Illinois Supreme Court denied Plaintiffs' petition for rehearing unanimously and without an opinion stating the reasons for the denial, and what those rea-

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the Third Circuit, which decided *Stretton*, and the Seventh Circuit, which issued *In re Mason*, have subsequently held that under the due process clause the appearance of impropriety alone does not mandate recusal. *See Johnson*, 369 F.3d at 260-62; *Del Vecchio*, 31 F.3d at 1371-72.

sons were is simply a matter of speculation. The Illinois Supreme Court may have denied Plaintiffs' rehearing petition because it found that Plaintiffs' exhibits provided no support for the factual contentions on which Plaintiffs sought Justice Karmeier's recusal. The Court may have decided (and, given the record, more likely did decide) that there was no basis in law or fact for attributing to State Farm the contributions of the U.S. and Illinois Chambers of Commerce and other such groups. The Court may have determined that the handful of modest contributions by State Farm employees raised no due process concerns. In short, Plaintiffs have attempted to manufacture a conflict between the Illinois Supreme Court and other state high courts by claiming that their unsupported allegations are the established facts of this case and by attributing to the Illinois Supreme Court a ruling it never made.

There is no inconsistency or conflict between Justice Karmeier's participation in the decision in this case and the due process principles enunciated by other state courts that have addressed recusal in the context of campaign contributions to judicial candidates. In particular, contrary to Plaintiffs' contentions, there is no "direct conflict" between Illinois and Florida and Oklahoma. Pet. at 20. Florida and Oklahoma do not apply "sharply different standards" (*id.* at 19) from those applied in Illinois. Indeed, the Florida and Oklahoma cases cited by Plaintiffs, *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001), and *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332 (Fla. 1990), provide no support for Plaintiffs' contention that Justice Karmeier's participation in this case violated Plaintiffs' due process rights.

Both *Pierce* and *MacKenzie* are consistent with the general rule that contributions by a party or an attorney to a judge's election campaign do not require recusal in subsequent cases in which the attorney or party is before the court. In *Pierce*, the Oklahoma Supreme Court found that a trial judge's disqualification was necessary where a litigant's attorney and the attorney's father had made maximum contributions to, and the attorney had solicited funds for, the

judge's election campaign during the same time that the attorney was appearing in proceedings before the judge. *Pierce*, 39 P.3d at 798. *Pierce* does not support disqualification where, as here, the judge's campaign is not ongoing at the time of his participation in the case. Here, although this case was pending in the Illinois Supreme Court before Justice Karmeier took office, it was *not* pending before Justice Karmeier at any time during his campaign. Justice Karmeier's participation in this case began only *after* his election to the Illinois Supreme Court and his taking office. *See* Painter Aff. ¶ 10 (Resp. App. 7a).

In *MacKenzie*, the Florida Supreme Court drew the same distinction between contributions made to a judicial campaign *before* the judge's participation in a litigation and contributions made *while* the judge was presiding over a case. In *MacKenzie*, the court emphatically rejected the contention that a prior contribution to a judge's campaign or prior participation by a lawyer or party in a judge's campaign could require recusal in a subsequent litigation. *See MacKenzie*, 565 So. 2d at 1337-38 ("'it would be highly anomalous if . . . *prior participation* in a justice's campaign could create a disqualifying interest, an appearance of impropriety o violation of due process sufficient to require the justice's recusal'") (emphasis added; citation omitted).[16]

In *Nathanson v. Korvick*, 577 So. 2d 943 (Fla. 1991), the Florida Supreme Court confirmed the stance it had taken in

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[16] In *MacKenzie*, the Florida Supreme Court ordered disqualification, not based upon campaign contributions, but upon the fact that in ruling on the disqualification motions at issue, the judge made statements and took actions that were inappropriate under the Florida procedure governing the handling of disqualification motions. *See MacKenzie*, 565 So. 2d at 1339 (requiring disqualification in one case because judge had transgressed Florida rule that "a judge who is presented with a motion for his disqualification 'shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification;'" requiring disqualification in second case because judge improperly avoided disqualifying herself by granting contributor attorney's motion to substitute another attorney).

MacKenzie that contributions to judicial campaigns do not require recusal by the judge involved. Specifically, in *Nathanson*, the Florida Supreme Court held that a judge was not required to disqualify herself in a case in which a litigant's attorney had contributed to her political campaign and served on her campaign committee. The court emphasized that "[a]s long as the citizens of Florida require judges to face the electorate, either through election or retention, 'the resultant contributions to those campaigns . . . are necessary components of our judicial system.'" *Id.* at 944 (quoting *MacKenzie*, 565 So. 2d at 1335); *see also Raybon v. Burnette*, 135 So. 2d 228, 228-31 (Fla. Dist. Ct. App. 1961) (fact that plaintiff's counsel ran as a candidate in hotly contested campaign against judge, who was endorsed by and received contributions from defendant's counsel, did not warrant judge's disqualification).

The approach adopted in Florida and Oklahoma is consistent with Illinois law and with court decisions across the country. As the Appellate Court of Illinois has stated, the "common theme" in cases requiring recusal is the judge's "*present, ongoing relationship* with the attorney while the case is still pending." *Gluth Bros. Constr., Inc. v. Union Nat'l Bank*, 548 N.E.2d 1364, 1368 (Ill. App. Ct. 1989) (emphasis added); *see also Snyder v. Viani*, 916 P.2d 170, 174-75 (Nev. 1996) (recusal not required where judge's interest is "not ongoing"); *Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Ct.*, 5 P.3d 1059, 1062 (Nev. 2000) ("contribution to a presiding judge by a party or an attorney does not ordinarily constitute grounds for disqualification"); *Roe v. Mobile County Appointment Bd.*, 676 So. 2d 1206, 1233 (Ala. 1995) ("such contributions have *uniformly* been held not to constitute grounds for recusal") (emphasis added), *overruled on other grounds by Williamson v. Indianapolis Life Ins. Co.*, 741 So. 2d 1057 (Ala. 1999); *In re Disqualification of Ney*, 657 N.E.2d 1367, 1367 (Ohio 1995) (recusal not required where litigant's attorney contributed to campaign and personally solicited contributions); *State v. Carlson*, 833 P.2d 463, 469 (Wash. Ct. App. 1992) (partici-

pation of state prosecutor in appellate judge's election campaign did not mandate recusal or "generate reasonable doubts as to [judge's] impartiality"); *Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. App. 1999) (rejecting claim that "judge should have recused himself because he had received substantial political donations from opposing counsel and from one of the parties"); Painter Aff. ¶ 10 (Resp. App. 7a) ("when candidates and voters put a campaign for judicial office behind them, judges and litigants should do the same and should not assume that there are present relationships requiring recusal simply because of prior relationships arising out of the election").

Thus, contrary to Plaintiffs' contentions, there is no conflict between state high courts for this Court to resolve in this case. The Illinois Supreme Court's decision not to require Justice Karmeier's recusal comports with the overwhelming weight of authority holding, whether as a matter of due process or as a matter of state law, a party's or attorney's contributions to a judicial election campaign are not, without more, a ground for requiring that the judge recuse himself or herself from subsequently participating in a case.

Moreover, Plaintiffs' further attempt to paint this case as involving "additional factors" beyond campaign contributions fails to create any conflicts worthy of resolution by this Court. *See* Pet. at 20 (citing *MacKenzie*, 565 So. 2d at 1336). For example, Plaintiffs claim that, under *MacKenzie*, the size and timing of the contributions in this case would entitle Plaintiffs to recusal because, under *MacKenzie*, "larger donations, made to a 'judge's judicial election campaign which was *ongoing* at the time of the underlying lawsuit' or where there was 'a specific and substantial political relationship' were 'additional factors,' . . . which might indicate a substantial enough connection to require recusal." Pet. at 20 (citing *MacKenzie*, 565 So. 2d at 1338 n.5). In making this contention, Plaintiffs distort the clear meaning of the words of the Florida Supreme Court.

The Florida Supreme Court's reference to a "judge's judicial election campaign which was *ongoing* at the time of the underlying lawsuit" does not encompass the situation in this case where the underlying lawsuit was ongoing at the time of the election campaign, but the judge in question was not yet participating in the case. It is the fact of the judge's participation at the time of a contribution from a party or litigant that may raise an issue for recusal. The fact that at the time of a judicial campaign contribution the case was pending not before the judge whose recusal is sought, but before other judges whose participation is not challenged has not been deemed a relevant factor in any case cited by Plaintiffs in their Petition or in their submissions to the Illinois Supreme Court.

Furthermore, the Florida Supreme Court's suggestion in *MacKenzie* that "a specific and substantial political relationship" might be an additional factor also unmistakably refers to a relationship that is ongoing while the judge is participating in or presiding over the case in question. *See MacKenzie*, 565 So. 2d at 1338 n.5 (where "attorney representing [a party in ongoing proceedings before trial judge] was the co-chair of the trial judge's judicial election campaign which was *ongoing* at the time of the underlying lawsuit "has a 'specific and substantial political relationship'") (citation omitted); *see also Pierce*, 39 P.3d at 798 (lawyer and lawyer's father had contributed the maximum permitted amount to judge's campaign, and lawyer had assisted the campaign by soliciting additional contributions from others, all "during a pending case in which the lawyer [was] appearing before that judge"). Finally, contrary to Plaintiffs' assertions (Pet. at 20), such additional factors as "large[] donations" and a "political relationship" (ongoing or not) are *not* "clearly in evidence here." State Farm made no contribution of any kind to Justice Karmeier's campaign. Nor have Plaintiffs presented evidence of any kind that would actually support the contention that there is any "political relationship" between State Farm and Justice

Karmeier, much less a specific or substantial or ongoing relationship. *See supra* at 5-11.

Plaintiffs also cite as a purported "additional reason for recusal" what they term the "harsh and very personal" nature of the race between Justice Karmeier and his opponent. Pet. at 18-21 & n.5. Plaintiffs, however, cite no case where a "harsh and very personal" campaign necessitated recusal, particularly where, as here, Plaintiffs have not alleged that any "harsh" and "personal" exchanges between the campaigns were in any way related to this case, to State Farm, or to Plaintiffs. Plaintiffs also seem to argue that *their* own campaign donations to Justice Karmeier's opponent or to the Democratic party provide "further reason for the public to believe that Justice Karmeier was biased against Petitioners, whose lawyers had contributed to his opponent, and that it affected his eventual vote in this matter." Pet. at 21 n. 5. Plaintiffs cite no support from any judicial decision or other authority that would support Plaintiffs' argument that their own contributions to a judge's opponent may be used as a basis for showing bias upon the part of a judge to whom they did not contribute. Moreover, Plaintiffs' suggestion, were it to become a basis for recusal, would lead to unending gamesmanship by allowing a party contributing to a judge's opponent to later argue that any unsuccessful verdict was somehow the result of bias. *See Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App. 1983) ("[p]erhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent"); *see also* Painter Aff. ¶ 6 (Resp. App. 4a) ("[i]f recusal on account of campaign contributions were to be the norm for the Illinois Supreme Court, litigants could literally pick the panel that would hear their case by contributing to justices they did not want on the panel").

In short, Plaintiffs' contention that the Illinois Supreme Court has adopted a recusal rule that creates substantial conflicts with the law of other States that should be resolved by

this Court does not withstand scrutiny. Plaintiffs have not shown that any other state court would require the non-participation of a justice on its high court based upon such contributions as were actually made by State Farm's employees and by the attorneys in this case. Plaintiffs have also not shown that any other state court would accept Plaintiffs' theory that the contributions of groups such as the U.S. Chamber of Commerce and ATRA should be attributed to State Farm, based upon the circumstances here. Plaintiffs have not shown that the Illinois Supreme Court did anything other than properly evaluate and reject Plaintiffs' far-fetched and unsupported allegations, arguments and speculation. The Illinois Supreme Court's determination that Plaintiffs' motion and petitions to disqualify Justice Karmeier were meritless presents no issue of law for this Court to resolve.

III. THE RECUSAL RULE PLAINTIFFS URGE IS INCOMPATIBLE WITH DUE PROCESS PRINCIPLES AND WOULD IMPERMISSIBLY INTRUDE ON THE STATES' PREROGATIVE TO REGULATE JUDICIAL ELECTION CAMPAIGNS

Plaintiffs urge this Court to grant certiorari and hold "that recusals are guaranteed by the Due Process Clause when campaign contributions of this magnitude are made by a party to a pending lawsuit to a judge sitting on the case." Pet. at 25. Not only is this case -- on its facts -- an improper vehicle for the recusal rule Plaintiffs seek (*see supra* at 11-12), but the absolute rule sought by Plaintiffs is antithetical to due process principles which call for examination of the particular circumstances of a case. Moreover, Plaintiffs' proposed rule would also improperly intrude upon the historic prerogative of the states to regulate their judiciaries and judicial elections through the enactment of legislative controls and the adoption of ethical rules, that weigh and accommodate the competing interests at stake.

Courts addressing recusal issues raised by contributions to judicial candidates have consistently recognized that "as long as the citizens . . . require judges to face the electorate, either through election or retention, 'the resultant contributions to those campaigns . . . are necessary components of our judicial system.'" *Nathanson*, 577 So. 2d at 944 (quoting *MacKenzie*, 565 So. 2d at 1335 (Fla. 1990); Painter Aff. ¶ 7 (Resp. App. 4a) ("system of choosing judges by popular election necessarily involves campaign contributions and whatever difficulties come with them").

Thus, in fashioning rules to govern judicial campaigns and contributions, courts and legislatures have balanced the policy need to encourage contributions and participation in judicial campaigns, particularly by members of the bar, and the policy need to craft rules of attorney conduct and judicial conduct to guard against improprieties in the election process. For example, Canon 5 of the ABA Model Code of Judicial Conduct, adopted by many states including Illinois, sets forth rules for judicial candidates, specifically prohibiting them from personally soliciting or accepting campaign funds. Model Code of Jud. Conduct Canon 5(C)(2) (2003).[17]

Individual states and their judiciaries have enacted further appropriate laws and rules to regulate judicial elections. Illinois, for example, requires disclosure of all contributions to judicial (and other) campaigns. As the Illinois Judicial Ethics Committee has stated, the State Election Code "makes such information [the identity of contributors and the amount of contributions] available to the public regarding contributions in excess of $150. Such a public record places judges and their campaign contributors under public scrutiny, thus providing some assurance of judicial impartiality." Ill. Jud. Ethics Comm., Op. 93-11 (1993), 1993 WL 774478, at *2.

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[17] Illinois has expressly adopted this provision of the Model Code of Judicial Conduct in Canon 7(B)(2) of the Illinois Code of Judicial Conduct. *See* Ill. Sup. Ct. R. 67(B)(2).

Other states (for example, Florida) have adopted caps or limits on contributions to judicial campaigns. *See, e.g., MacKenzie*, 565 So. 2d at 1336-37. Finally, through statutes, rules and judicial decisions, states have developed standards for determining when campaign related contributions or activities require disqualification or recusal. *See* Point II *supra*.

Such matters belong appropriately to the individual states and for the most part do not implicate due process. *See, e.g., FTC v. Cement Inst.*, 333 U.S. at 702 ("most matters relating to judicial disqualification [do] not rise to a constitutional level"); *see also Tumey*, 273 U.S. at 523 ("[M]atters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion.").

Thus, states are free to establish standards governing recusal and campaign contributions. States may limit such contributions or require recusal where contributions over a certain amount are made. The Due Process Clause, however, does not establish a "uniform standard," it establishes a "constitutional floor." *Bracy*, 520 U.S. at 904. As the Court stated in *Bracy*, the due process "floor" is "a 'fair trial in a fair tribunal,' before a judge with *no actual bias against* the defendant *or interest in the outcome of* his particular case." *Id.* at 904-05 (emphasis added; citation omitted).

Whether that standard is met depends upon the relevant circumstances and cannot be embodied in a static rule such as that proposed by Plaintiffs here. As this Court has repeatedly stated, due process is "'not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961)). *See also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). Accordingly, the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *McElroy*, 367 U.S. at 895.

Here, the hard and fast rule that Plaintiffs claim due process requires would make irrelevant the particular considerations and factors of Justice Karmeier's campaign and his participation in this case. It is easy in this particular case to conclude that Plaintiffs' attribution to State Farm of contributions from organizations such as the U.S. Chamber of Commerce or unrelated corporations such as PPG and Dana (*see* n.10 *supra*) is entirely without foundation. In another case, conceivably, such allegations might require a careful sifting of the facts. But either way, the actual, particular facts are relevant to the due process analysis. Likewise, such matters as the gravity of disqualifying a state supreme court justice (as opposed to a trial court judge who may be replaced) and the substantial interest of the State of Illinois in having a full quorum of its Supreme Court present to decide important issues of Illinois law (such as those raised by this case), are relevant to the due process inquiry.[18]

Moreover, the rule Plaintiffs propose that this Court adopt would impermissibly chill participation in the judicial electoral process in violation of the First Amendment. This Court has held that – due to First Amendment considerations – judicial elections should not be distinguished in any meaningful way from other executive and legislative elections. *See White*, 536 U.S. at 781-82, 787-88. However, the rule

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[18] Strong public policy concerns counsel that a justice of a state's highest court, such as Justice Karmeier, must be extremely wary of recusing himself without sufficient reason. *Cf. Cheney*, 541 U.S. at 915 (Scalia, J.) (rejecting party's suggestion to "resolve any doubts in favor of recusal;" stating "[t]hat might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: the Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case.") (citation omitted); *Roe*, 676 So. 2d at 1233 (rejecting recusal of Alabama Supreme Court justices on basis of campaign contributions; stating that as judges elected to serve as a court of last resort, their participation in deciding an important case was a necessary part of their "judicial function").

Plaintiffs urge would discourage both contributions and participation in judicial campaigns by litigants and attorneys if support of a particular judicial candidate would later result in a prohibition upon appearing before that judge. *See Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 310 (E.D. Pa. 1998) (under such a rule, "an elected judge cannot sit in any case unless the attorneys for all parties have made a binding commitment never to contribute to his campaigns"). Just as the "announce clause" at issue in *White* was held to unconstitutionally restrict judges' free expression during elections, Plaintiffs' proposed rule would impermissibly chill the First Amendment rights of lawyers and potential litigants wishing to participate in the electoral system by supporting the candidate(s) of their choice. *Cf.* Ill. State Bar Ass'n, Advisory Op. No. 866, (1984), 1984 WL 262795, at *1 (noting "the implicit value" of "participation by attorneys" in judicial election campaigns and "the need that attorneys not be considered 'second class citizens' in connection with political activities").

Plaintiffs are understandably unhappy that their judgment was reversed. But the fact is that the Illinois Supreme Court was unanimous on many parts of its decision, including reversal of the nationwide contract class and reversal of the ICFA claim and the punitive damages awarded under that claim. Those portions of the Illinois Supreme Court's decision would remain unaltered regardless of Justice Karmeier's participation in the decision below. Moreover, the Illinois Supreme Court was unanimous in its initial rejection of Plaintiffs' motion to disqualify Justice Karmeier, in its subsequent determination that the issue was moot, and in its denial of Plaintiffs' petition for rehearing. This Court should reject Plaintiffs' attempt to salvage some part of their case by improperly impugning the integrity of Justice Karmeier and the Illinois Supreme Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully Submitted,

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RESPONDENT'S APPENDIX

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AFFIDAVIT OF PROFESSOR RICHARD W. PAINTER, DATED JANUARY 31, 2005

No. 91494

IN THE SUPREME COURT OF ILLINOIS

MICHAEL E. AVERY, et al., on behalf of themselves and all others similarly situated,	)	On Appeal from the Appellate Court of Illinois, Fifth District No. 5-99-0830
Plaintiffs-Appellees,	)	There Heard on Appeal from the Circuit Court for the First Judicial Circuit, Williamson County
vs.	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	No. 97-L-114
Defendant-Appellant.	)	John Speroni, Judge Presiding.

AFFIDAVIT OF RICHARD W. PAINTER

Richard W. Painter, being of adult age and under no legal disability, upon sworn oath deposes and states as follows:

1. I am the Guy Raymond and Mildred Van Voorhis Jones Professor of Law at the University of Illinois College of Law. I received a B.A. from Harvard University in 1984 and a J.D. from Yale Law School in 1987. My professional experience includes a one-year clerkship with Judge John T. Noonan, Jr. of the United States Court of Appeals for the Ninth Circuit, 2 ½ years of private practice with Sullivan & Cromwell in New York City, another 2 ½ years of private

practice with Finn Dixon & Herling in Stamford, Connecticut, and twelve years of law teaching. I am a member of the bar of the State of New York. I am the author or co-author of over two dozen law review publications, many of which concern matters of professional ethics. I am also the co-author with Judge Noonan of a casebook, Personal and Professional Responsibilities of the Lawyer (First Edition 1997) (Second Edition 2001) (Foundation Press), Chapter 10 of which exclusively discusses judicial ethics including judicial bias and recusal. A copy of my curriculum vitae is attached hereto as Exhibit A.

2. I am submitting this affidavit in support of the opposition of Defendant-Appellant State Farm Automobile Insurance Company ("State Farm") to Plaintiffs-Appellees' Conditional Motion for Non-Participation of Hon. Lloyd Karmeier. Before preparing this affidavit and opining on this matter, I reviewed the documents provided to me by State Farm's counsel that are listed in Exhibit B attached hereto. Based on my review of these documents, I believe that Justice Karmeier should not recuse himself from this case. I also believe that, under the circumstances, it would be irresponsible for Justice Karmeier to fail to do the job for which he was elected by the voters of the State of Illinois, which includes participating in decision of this case.

Recusal on Account of Campaign Contributions Not Required

3. The principal issue in this motion is whether a justice of the Illinois Supreme Court should recuse himself from deciding a case involving a corporation if employees of and attorneys for the corporation contributed to his campaign for judicial election and/or if business or civic organizations in which the corporation is a member contributed to the Justice's judicial campaign.

4. I strongly believe that in the vast majority of situations the answer to both of the above questions is "no." A judge should not recuse himself from cases involving a company whose employees contributed to his campaign. A judge also in most cases should not recuse himself from cases in which a litigant's attorneys, or organizations of which the corporation is a member, contributed to his campaign. To conclude otherwise would give undue weight to the persuasive power of campaign contributions over judicial decisions after the conclusion of a campaign for judicial office. This is particularly true in a case such as this case where the campaign contributions in question from employees of State Farm (listed in footnote 18 to plaintiffs' Memorandum) are de minimis ($200 to $250) and the campaign contributions by law firms representing State Farm, while larger, are made by law firms with hundreds or thousands of lawyers that represent hundreds of clients. Most important, all of these contributions were made to a campaign last year that is now over. If judges and justices cannot, after their election, be trusted to be impartial towards the hundreds, often thousands, of people who helped them get elected, as well as to be impartial towards the hundreds, often thousands, of other people who opposed them for election, those judges and justices should not hold judicial office in the first place. A jurisdiction that cannot elect judges who can thus be trusted to be impartial should find some other way of selecting its judiciary.

5. Recusal on account of campaign contributions furthermore could make the judicial system unmanageable because of the sheer number of potential conflicts created by political campaigns. If both plaintiffs' lawyers and defendants aggressively make contributions over a period of years, as they are increasingly doing so in many states including Illinois, it is conceivable that few if any Supreme Court justices would be left to decide many of the most important cases in the State (particularly those such as class actions or mass tort litigation in which both plaintiffs'

lawyers and defendants often make campaign contributions) The Illinois Supreme Court would be incapacitated simply because litigants had on their own initiative contributed to judicial campaigns and then other litigants filed motions to recuse.

6. Worse yet, recusal on account of campaign contributions would create an easy avenue for litigants to disqualify judges they did not like. If recusal on account of campaign contributions were to be the norm for the Illinois Supreme Court, litigants or their counsel could literally pick the panel that would hear their cases by contributing to justices they did not want on the panel. Under this scenario, justices could even extort money by letting it be known in advance that they disagreed with a litigation position, inviting parties and litigants to force recusal by making campaign contributions. Even a justice who had no such intentions could be accused of extortion if ethics rules were interpreted so absurdly that campaign contributions were automatically allowed to buy nonparticipation.

7. A system of choosing judges by popular election necessarily involves campaign contributions and whatever difficulties come with them. The only rational method of avoiding these difficulties created by such contributions would be to ban *all* contributions to judicial campaigns. Because of well-known constitutional constraints on campaign finance legislation, however, a broad ban on campaign contributions would probably require abolition of campaigns through substitution of an appointed judiciary for an elected one. States, like Illinois, that choose to elect their judges must accept the difficulties that come with injection of money into judicial campaigns, and must recognize that for judges and justices not to do their jobs -- by refusing to hear cases involving campaign contributors -- only makes these difficulties worse.

8. Case law in Illinois thus for good reason overwhelmingly supports the proposition that lawyers' and parties' contributions to campaigns for judicial office and participation in campaigns for judicial office ordinarily do not justify a judge's nonparticipation in a case involving the same parties. In People v. McLain, 226 Ill. App. 3d 892, 589 N.E.2d 1116 (1992), the Second District Appellate Court held that, even in a criminal trial in which judicial bias is particularly odious and due process concerns are particularly important, a defendant was not entitled to have her first degree murder conviction reversed on the ground that the state's attorney had chaired the trial judge's election campaign. The Court emphasized that the public knew of the connection between the state's attorney and the trial judge before the election and nonetheless elected the judge to a position where he would hear cases brought by the state's attorney. Id. at 904, 589 N.E.2d at 1124. Recusal would thwart the will of the voters, because "[a]s a practical matter, were we to adopt the position urged by defendant, it would mean that [the Judge] would be disqualified from sitting on any cases, criminal or civil, involving the office of the State's Attorney." Id. at 903, 589 N.E.2d 1123. In the instant case also, relationships that both Justice Karmeier and his opponent had with the business community and with the trial bar were well known to the voters in advance of the Illinois Supreme Court election, a point made obvious by the many newspaper articles attached to plaintiffs' motion for nonparticipation. The voters chose Justice Karmeier rather than his opponent to hear cases, including this case, in which the same competing interests that had contested the election would themselves be parties and trial counsel. Recusal of Justice Karmeier from cases involving the many parties that participated in the Illinois Supreme Court election would affect appellate litigation throughout the entire State of Illinois in much the same sweeping manner as recusal in People v. McLain would have had affected litigation involving the State's Attorney's office in McHenry County.

The court was right to reject recusal as a remedy for perceived bias in People v. McLain and this Court would be right to reject recusal here. See also Ill. Judicial Ethics Comm. Op. 93-11 (1996) (citing McLain and other relevant cases and concluding that a judge "is not affirmatively required to disqualify himself . . . merely because a lawyer or party appearing before the judge was a campaign contributor.")

9. There are a few circumstances in which the involvement of a party or a lawyer in a judge's campaign for judicial office could be so extensive as to justify recusal of the judge from a case involving the party or lawyer. For example, recusal might be justified if one of the lawyers in a case is currently serving as campaign chairman for the judge or in another very prominent role in the judge's ongoing campaign, although probably not if the lawyer or party only makes a campaign contribution. A judge's ongoing campaign can depend upon a party or lawyer whose withdrawal of support arguably could cost the judge the election. The temptation, or the perceived temptation, on the judge's part to accommodate the party or lawyer whose withdrawal of support could cost him the election might be so great as to justify recusal. This situation is very different from the situation in which the party or lawyer has a relatively minor role in an ongoing campaign or previously had a role in a campaign that has concluded.

10. The Illinois Appellate Court for the Second District thus was correct, in Gluth Brothers Construction, Inc. v. Union National Bank, 192 Ill. App. 3d 649, 548 N.E.2d 1364 (1989), to distinguish between a present and ongoing relationship between a party or lawyer and a judge, which if extensive enough might justify recusal, and a past relationship between a party or lawyer and a judge. The court in Gluth Brothers denied a motion for recusal of a judge because the plaintiff's lawyer and his wife had previously served as chairman and treasurer respectively of

the lawyers' committee supporting the judge for election. The Court point out that "the common theme in each of the cases [cited in support of the motion for recusal] was that the judge had a present, ongoing relationship with the attorney while the case was still pending. Thus the courts held that it was reasonable to conclude that an appearance of impropriety existed in situations which involved a current relationship between the judge and one of the attorneys." Id. at 655, 548 N.E.2d at 1368 (emphasis added). Plaintiffs in the instant case point out that this case was pending before the Illinois Supreme Court at the time of the election last Fall, but that fact is not relevant because Justice Karmeier, not the Illinois Supreme Court as a whole, is the subject of this motion. This case was not pending before Justice Karmeir at any time during the election, and now that this case is pending before Justice Karmeir, the parties and lawyers who are interested in the outcome of this case, whether or not they participated in his campaign or opposed him, are not in a position to affect the outcome of the election. Plaintiffs are aware of, and seek to obfuscate, the Gluth Brothers distinction between past and present relationships in their Memorandum in support of this motion -- plaintiffs thus allude to present relationships between Justice Karmeir and parties and lawyers in this case and then claim that because of these relationships Gluth Brothers supports this motion. *See* Memorandum at 18. The specific facts cited in support of plaintiffs' contention that present relationships exist, however, are almost exclusively prior relationships, principally arising out of the now concluded Illinois Supreme Court election campaign. *See* Memorandum at 19. The Gluth Brothers holding stands for the sensible proposition that when candidates and voters put a campaign for judicial office behind them, judges and litigants should do the same and should not assume that there are present relationships requiring recusal simply because of prior relationships arising out of the election. In the instant case, Justice Karmeier's election campaign has been terminated and is no longer receiving contributions from

anyone. All of the relationships alleged by the plaintiffs with any particularity in their motion for nonparticipation, to the extent they previously existed, have now ended. There is no existing conflict of interest.

11. Not only does Illinois case law not support recusal of Justice Karmeier in this case, but the Illinois Supreme Court Code of Judicial Conduct, although cited frequently in plaintiffs' Memorandum in support of their Motion, also gives little support for recusal. Canon 3C provides a detailed, but nonexclusive, list of specific situations in which a judge shall disqualify himself from a case Campaign contributions or involvement of employees or parties or lawyers in campaigns for judicial office is not one of them. Canon 7 requires a Judge to avoid inappropriate political activity and contains detailed discussion of what a judge may and may not do in connection with setting up a political campaign and receiving campaign contributions. Once again, there is no mention of a rule requiring a judge to recuse himself from a case in which employees of a party or lawyers for a party or even the party itself have made campaign contributions. All plaintiffs can find in the entire Canons that is relevant to their motion is a single sentence in the Committee Commentary to Canon 7 stating that "campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under subsection C of Canon 3." ILCS Code of Judicial Conduct, Canon 7, S. Ct. R. 67 cmt. (2004) This sentence tells us nothing that the above cited Illinois case law does not already reveal – that there are circumstances in which a judge's knowledge of campaign contributions by persons who are appearing before the judge may merit disqualification of the judge, for example if the judge solicited the campaign contributions from persons appearing before him or if large contributions are made contemporaneously with the contributors' appearance before the judge. Here, Justice Karmeier did not solicit the campaign contributions; he probably gained most of his knowledge of the contributions

from papers that plaintiffs themselves filed in support of their recusal motion, the campaign contributions are de minimis ($200 to $250) and the contributions were made to a campaign that is over. The contributors probably had little influence over the election when it did occur, and now clearly have no influence, direct or indirect, over whether Justice Karmeier will sit on the Illinois Supreme Court. These contributors thus are not in a position where they could conceivably influence Justice Karmeier's disposition of their case.

12. Courts in other jurisdictions have also addressed this question, and have routinely decided that campaign contributions, or other involvement by parties or lawyers in, a concluded campaign for judicial office does not justify recusal In Williams v. Viswanathan, 65 S.W.3d 685 (Texas App. 2001), the plaintiff sought recusal of a justice because his attorney ran against the justice in a primary, the plaintiff had participated in his lawyer's campaign, and opposing counsel's law firm had contributed to the justice's campaign. The plaintiff's motion for recusal was denied for many of the aforementioned reasons, including that such recusal could lead to an endless round of recusal motions, for example because someone involved in a case refused to contribute to a justice's campaign or contributed to an opponent's campaign. The appellate court affirmed, stating that "Indeed, if such a path were begun, very seldom would the justices of our two courts of last resort be able to perform their mandated duties." Id. at 689. See also Rocha v. Ahmad, 662 S.W.2d 77, 78 (Tex. App. 1983) (denying recusal motion on account of campaign contributions and observing that "[i]f a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts."); Zaias v. Kaye, 643 So. 2d 687, 687 (Fla. Dist. Ct. App. 1994) ("The fact that an attorney made a campaign contribution to a judge or served on a judge's

campaign committee does not, without more, require disqualification.").

13. It furthermore would be inappropriate for a judge to voluntarily recuse herself routinely from cases involving campaign contributors or their employees, a recusal policy that would beg for contributions from parties seeking recusal of the judge (a thinly veiled form of extortion by the judge). It thus comes as no surprise that most jurisdictions provide that judges shall hear and decide matters assigned to the judges except those in which disqualification is required or recusal is appropriate. In cases where recusal is inappropriate, therefore, it would be unethical for a judge not to hear a case, and most cases involving campaign contributors fall into this category.

The Adverse Impact of Recusal of an Appellate Judge

14. Tradeoffs inherent in recusal are different for appellate judges than for trial judges. Damage to judicial institutions can be particularly severe, and reduction in litigants' risk of prejudice from judicial bias particularly unlikely, when appellate judges recuse themselves in circumstances where recusal was not required. See Cheney v. United States Dist. Ct. for District of Columbia, 124 S. Ct. 1391 (2004) (Memorandum of Scalia, J.) (Justice refused to recuse himself on account of duck hunting trip with the Vice President, a party to the case, and explained the impact unjustified recusal would have on the reputation and functioning of the Court). Reputational injury from caving in to unjustified demands for recusal is particularly acute when recusal is coerced by press reports that dwell on little more than purported appearances of impropriety. See id. at 1402. See also Washington v. Carlson, 833 P.2d 463 (Wash. Ct. App. 1992), in which the court held that an appellate judge was not required to recuse himself in a criminal case on account of a prosecutor's participation in the judge's reelection campaign. The court in Carlson discussed the

disruptive effect of recusal on the appellate process; and pointed out important policy arguments against recusal, including the fact that bias toward a party is less likely to affect appellate decisions rendered in written opinions by panels of several judges. Id. at 468.

15. Recusal furthermore has an adverse effect on the quality of justice that is even more salient in the case of a state's highest court. In a state such as Illinois where an appellate judiciary is elected, every case in which one or more justices recuses themselves for whatever reason, is heard by a court other than the court which voters elected to hear the case. The balance, with respect to judicial philosophy and other factors, that voters chose for the court has been changed, because the parties, through their campaign contributions and recusal motions, are allowed to choose the justices who hear their case. The composition of appellate panels, and the likely outcome of cases, is thus manipulated in a manner never contemplated by the state Constitution. This is so even though appellate decisions are binding on persons besides the parties in the case, and decisions of the Supreme Court of Illinois are binding on all future litigants in Illinois. The Illinois Constitution gives voters the right to shape the future of Illinois case law by electing Justice Karmeier and his colleagues, but this right is compromised every time a justice of the Illinois Supreme Court recuses himself. For this reason, recusal, while sometimes necessary to protect the integrity of the adjudicative process, should never be taken lightly and should be grounded in concerns far more compelling than mere appearances.

The Irrelevance of Press Reports

16. Finally, Illinois courts have gone out of their way to show skepticism toward the tactic used by plaintiffs here when they attach volumes of newspaper and magazine articles, many disfavorable, about the most recent Illinois

Supreme Court election, and then claim those articles demonstrate an appearance of impropriety requiring Justice Karmeier's recusal from this case. See People v. Coleman, 168 Ill. 2d 509, 660 N.E.2d 919 (1995) (pointing out that the fact that a judge has been subjected to press criticism in connection with a case or party to a case does not necessarily require the judge's disqualification). Actual bias based on present ongoing relationships with litigants or lawyers, not a perception of bias based on press coverage of a bygone election, should form the basis for recusal. There is no such bias here and the motion for recusal should be denied.

The Irrelevance of Liljeberg v. Health Services Acquisition Corp.

17. The United States Supreme Court case cited by plaintiffs several times in support of their motion, Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988), has nothing to do with the facts or issues in this case other than the fact that that case too involved recusal of a judge. Substantial portions of Liljeberg are excerpted and discussed in Chapter 10 of my professional responsibility casebook. See Noonan & Painter (2d. ed.) supra, at 725-735. Liljeberg involved a Judge who sat on the board of trustees of a university that had a financial interest in a case that was contemporaneously before the Judge; the Supreme Court correctly ruled that the Judge should have recused himself. The Supreme Court also ruled in Liljeberg that the Judge's lack of actual knowledge of the conflict at the time did not justify his failure to recuse himself in circumstances where the facts then known to the judge would put a reasonable person in his position on notice that there was a conflict (e.g the test for disqualification is based on objective facts rather than subjective intent, and a judge's unreasonable belief that there was no conflict does not justify failure to recuse himself). Liljeberg, 486 U.S. at 859. These distinctions have nothing to do with the issues in this motion, which turn not on Justice Karmeier's objective knowledge or subjective

intent, but instead on the plaintiffs' allegations of relationships between parties, lawyers and Justice Karmeier and plaintiffs' incorrect assumption that the time frame of those alleged relationships was such that they would likely influence Justice Karmeier's participation in this case. Liljeberg thus is irrelevant to this case.

My Prior Opinions on this Issue

18. I previously opined on this same issue in a 2002 letter to the United States Senate Judiciary Committee in connection with its evaluation of the character and fitness of a nominee for the federal courts. A member of the Committee, Senator Hutchison of Texas, asked me to opine on whether prior receipt of campaign contributions from lawyers or employees of a litigant required a Justice of the Texas Supreme Court to recuse herself from a case in which that litigant was a party. My answer was the same then as it is here – a resounding "no." Campaign contributions do not require recusal and in the vast majority of such cases, recusal would indeed be improper and would reflect poorly on the court of which the judge is a member.

FURTHER, AFFIANT SAYETH NOT

/s/Richard W. Painter
Richard W. Painter

STATE OF ILLINOIS)
) ss.
COUNTY OF CHAMPAIGN)

SUBSCRIBED AND SWORN to before me this 31 day of January, 2005.

/s/ Deanna Falls
NOTARY PUBLIC

APPELLEES' MOTION TO RECONSIDER THE DENIAL OF CONDITIONAL MOTION FOR NON-PARTICIPATION AND/OR RECUSAL OF JUSTICE KARMEIER

No. 91494

IN THE SUPREME COURT OF ILLINOIS

MICHAEL E. AVERY, et al., on behalf of themselves and all others similarly situated,	)	On Appeal from the Appellate Court of Illinois, Fifth District No. 5-99-0830
Plaintiffs-Appellees,	)	There Heard on Appeal from the Circuit Court
vs.	)	for the First Judicial Circuit, Williamson
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	County No. 97-L-114
Defendant-Appellant.	)	John Speroni, Judge Presiding.

APPELLEES' MOTION TO RECONSIDER THE DENIAL OF CONDITIONAL MOTION FOR NON-PARTICIPATION AND/OR RECUSAL OF JUSTICE KARMEIER

Plaintiffs-Appellees, through all of their attorneys, respectfully move this Honorable Court to Reconsider the denial of Appellees' Conditional Motion for Non-Participation and/or recusal of Justice Karmeier in the decision of this case for one or more of the following reasons:

(A) Since the Appellees filed their motion, Appellees have learned that the U.S. Chamber of Commerce (who donated almost all of their funds to Justice Karmeier's campaign) has become the largest political donor in Illinois. *Supreme Court Contributors Rocket to Top of Illinois' Donors List, Fall 2003-2004 Campaign Finance Analysis Posted to ilcampaign.org*, March 15, 2005. (Exhibit "1A");

(B) Justice Karmeier's own comments on the integrity, fairness and impartiality of the judiciary as a result of the election process call for a recusal by Justice Karmeier (who did not participate in the Appellees' Conditional Motion for Non-Participation), himself. *What's the Measure of Judicial Excellence*, Illinois Bar Journal, October, 2002, Vol. 90, pp.516 - 521, 556. (Exhibit "1B");

(C) Public policy and the interest of justice require that this Honorable Court issue a written opinion providing the legal reasoning which supports the denial of the Appellees Conditional Motion for Non-Participation to provide guidance for future campaign donors and that Justice Karmeier indicate whether he intends on participating in this decision by ruling on Appellees' motion for recusal; and

(D) Justice Karmeier's participation would violate the Appellees' due process rights, guaranteed by the Fourteenth Amendment.

1. On January 26, 2005, Plaintiffs-Appellees filed a Conditional Motion for Non-Participation of Justice Karmeier.

2. On January 31, 2005, Defendant-Appellant filed the Opposition of Defendant-Appellant State Farm Mutual Insurance Company to Plaintiffs-Appellees' Conditional Motion for Non-Participation.

3. On February 4, 2005, Appellees filed a Motion for Leave to File Memorandum in Response to Appellant's Opposition to Appellees' Conditional Motion for Non-Participation, Instanter and the Memorandum, itself.

4. On February 9, 2005, Defendant-Appellant filed the Opposition of Defendant, State Farm Mutual Insurance Company to Plaintiff-Appellees' Motion for Leave to File Memorandum in Response to Appellant's Opposition to Appellees' Conditional Motion for Non-Participation.

5. On March 16, 2005, this Honorable Court entered an Order denying Appellees' Conditional Motion for Non-Participation, without any comment and/or reasoning for the denial of the motion. (Exhibit "1C"). The Order entered ruling on the motion indicates that Justices Thomas and Karmeier did not participate. Hence, by definition, Justice Karmeier has not ruled on his recusal, an act unique to his own decision.

6. Appellees' Conditional Motion for Non-Participation raises a very important issue, not only to the parties involved in this case, but to the citizens of Illinois because the integrity of the judicial process, itself, is at issue in this case. This Court will decide whether consumers around the country do or do not receive substantial compensation.

7. The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of

existing law. *Itasca Bank and Trust Co. V. Thorleif Larsen and Son, Inc.*, 352 Ill. App. 3d 262, 265 (2d Dist. 2004). Since the filing of Appellees' Motion, indeed since that motion was presented to the Court, newly released figures by the Illinois Campaign for Political Reform and the Sunshine Project have shed additional light on the issues raised in the other pleadings filed by Appellees which further support Appellees' request for Justice Karmeier's disqualification and/or recusal which were not available for consideration by this Court in connection with the Order entered denying Appellees' motion on this very important issue. These figures might well have impacted the outcome of that determination.

8. The evidence established in the initial pleadings and the newly disclosed campaign donation figures by the Illinois Campaign for Political Reform and the Sunshine Project establish that if Justice Karmeier participates in ruling in the *Avery* matter there will be – at a minimum – the appearance of impropriety. Particularly where, as is more fully documented in the attached memorandum offered in support of this motion and in the initial briefing on this issue, it appears from the available public records that Justice Karmeier accepted for his campaign fund more than $2,000,000.00 from parties who actively argued for State Farm's position in this pending case. The appearance of impropriety warrants non-participation and/or recusal. *In re Marriage of Wheatley*, 297 Ill. App. 3d 854, 859 (5th Dist. 1989). Additionally, participation by Justice Karmeier would violate the Appellees' ability to present their case to an impartial tribunal, which is a fundamental component of due process. *Bridges v. California*, 314 U.S. 252, 282 (1941).

9. Furthermore, following the election, Justice Karmeier spoke out about the election and the negative impact it had on the perceptions citizens would have of the

judiciary. In his comments, Justice Karmeier voiced concerns about the independence of the judiciary, stating:

> [w]e've come through a long campaign that did not lend itself well to the judiciary. We need to try to address these issues that arose there ... so the independence of the judiciary is not questioned because of the campaigns judges are required to run. *St. Louis Today*, December 7, 2004. (Exhibit "1D").

The very words and concerns voiced by Justice Karmeier, himself, call for a recusal by Justice Karmeier, so that the independence of the judiciary is not questioned.

10. Additionally, Justice Karmeier has commented on what it takes to be an "excellent" judge, stating: "[a]n excellent judge must not only do justice, but must in the process communicate with the participants in such a way they leave the courtroom with a sense that justice was done." *What's the Measure of Judicial Excellence*, Illinois Bar Journal, October, 2002, Vol. 90, p. 519. (Exhibit "1B"). This Honorable Court's denial with no comment of the Appellees' Conditional Motion for Non-Participation of Justice Karmeier in this case has left the Appellees' wondering whether justice was done. A denial of a lengthy and passionately argued motion with no comment does not meet the standard set forth in Justice Karmeier's paper. Moreover, the absence of a ruling on the Appellees' request that Justice Karmeier recuse himself does not meet the standard set forth in Justice Karmeier's paper.

11. Public policy and the interest of justice require that the reasoning for the denial of the motion be communicated regarding this very important issue. Quite simply, the Court was presented with a Motion supported by Affidavits, and opposed by counter-Affidavits, creating at the very least a factual issue to be decided predicate to any denial of the

motion. It was hoped, of course, that Justice Karmeier would have recused himself, as certainly Justice Magg said he would have, had he prevailed at the polls. Justice Karmeier has, to date, elected not to do so, requiring the remainder of the Court to reach a decision in this case. The issue of the fairness of the tribunal is one of Constitutional magnitude. With conflicting evidence before the Court, how could that issue be decided without a hearing or explanation? In one way only – if the Court regarded it as a matter of law. But what sort of legal principle could it be which gives blanket approval to a circumstance that has shocked even the voters of Illinois? Appellees are aware of no such rule, and State Farm has suggested none. At the very least, the legal reasoning which animates the Court should be set forth for the guidance of future cases as to preserve the parties right to further review. Absent a written ruling on this very important issue, there is no guidance, and there is an open invitation to the similar and perhaps more egregious conduct in the future by special interest groups who seek to undermine the judicial system as well as the integrity and impartiality of the judiciary. This motion demonstrates a crisis of confidence in the outcome of this case, which calls for an explanation by the court. A lack of an explanation only exacerbates this crisis.

WHEREFORE, for all of the reasons stated above, in the attached Memorandum in Support of Appellees' Motion to Reconsider the Denial of Conditional Motion for Non-Participation, and in the Appellees' initial papers on this issue, Plaintiffs-Appellees most respectfully request that this Honorable Court reconsider the denial of Appellees' Conditional Motion for Non-Participation of Justice Karmeier and enter an appropriate Order for his non-participation. Alternatively, Plaintiffs-Appellees' most respectfully request that Justice Karmeier recuse himself from ruling on this matter. Additionally, Appellees' specifically request that this Honorable Court issue a written

opinion regarding this most important issue to set forth guidance for future cases.

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OBJECTION OF DEFENDANT-APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY TO PLAINTIFFS-APPELLEES' MOTION TO RECONSIDER THE DENIAL OF CONDITIONAL MOTION FOR NON-PARTICIPATION AND/OR RECUSAL OF JUSTICE KARMEIER

No. 91494

IN THE SUPREME COURT OF ILLINOIS

MICHAEL E. AVERY, et al., on behalf of themselves and all others similarly situated,	)	On Appeal from the Appellate Court of Illinois, Fifth District No. 5-99-0830
Plaintiffs-Appellees,	)	There Heard on Appeal from the Circuit Court
vs.	)	for the First Judicial Circuit, Williamson
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	County No. 97-L-114
Defendant-Appellant.	)	John Speroni, Judge Presiding.

OBJECTION OF DEFENDANT-APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY TO PLAINTIFFS-APPELLEES' MOTION TO RECONSIDER THE DENIAL OF CONDITIONAL MOTION FOR NON-PARTICIPATION AND/OR RECUSAL OF JUSTICE KARMEIER

Defendant-Appellant, State Farm Mutual Automobile Insurance Company ("State Farm"), respectfully submits this objection to Plaintiffs-Appellees' Motion to Reconsider the

Denial of Conditional Motion for Non-Participation and/or Recusal of Hon. Lloyd Karmeier, filed March 22, 2005. In support of this objection, State Farm states as follows:

1. After the filing of extensive written submissions by the parties, this Court, by Order dated March 16, 2005, denied Plaintiffs' conditional motion for the non-participation of Justice Karmeier. In moving for reconsideration, Plaintiffs still have failed to present any basis for disqualifying Justice Karmeier from participating in the decision of this case.

2. Plaintiffs first repeat their arguments, already made in support of their original motion, regarding the U.S. Chamber of Commerce's campaign contributions to the Illinois Republican Party. The fact that, with final reports in, the total contribution of the U.S. Chamber of Commerce to the Illinois Republican Party is now higher than it was when Plaintiffs made their original motion does not change or bolster Plaintiffs' arguments. As shown in State Farm's opposition to Plaintiffs' original motion, (i) there is no authority requiring judicial recusal or disqualification on the basis of campaign contributions from an organization (such as the U.S. Chamber of Commerce) that has submitted an *amicus curiae* brief (*see* SF Opp. ¶ 20); (ii) there is no legal or factual basis for attributing to State Farm contributions made by the U.S. Chamber of Commerce, simply because a State Farm officer is one of the more than 100 members of the Chamber's board of directors (*see id.* & n.11); and (iii) even if all the contributions Plaintiffs have improperly attempted to attribute to State Farm were considered, campaign contributions are not a basis for recusal unless made *while* a judge is actually participating in the case at issue (*id.* at ¶¶ 8-16). As a matter of law and fact, Justice Karmeier's participation in this case *after* (not during) his

campaign is entirely proper, as this Court's March 16, 2005 Order determined.[1]

3. Plaintiffs also submit more newspaper and magazine articles, most of which antedate their original motion, including a 2002 article on judicial excellence authored by a Illinois Bar Association subcommittee which Justice Karmeier chaired. None of this material adds anything new or justifies this Court's reconsideration of its denial of Plaintiffs' original motion for Justice Karmeier's non-participation in the decision of this case.

4. In their reconsideration motion, Plaintiffs make one addition to their original attack on Justice Karmeier. In their original motion, Plaintiffs asserted that the issue was "not whether Justice Karmeier is actually biased in favor of State Farm." Pl. Original Mem. at 9. Now, in their reconsideration motion, Plaintiffs make a new, baseless allegation of actual bias on the part of Justice Karmeier. *See* Pl. Reconsideration Mem. at 9 (claiming that "it is undisputable that Justice Karmeier has a bias not just toward State Farm's legal position, but for State Farm as a party"). The only support offered by Plaintiffs for this improper assertion of bias is a reference to the discussion in their prior briefing of purported connections between Justice Karmeier's campaign and State Farm. *See id.* at 10. This Court has already rejected the allegations contained in that discussion, and Plaintiffs' attempt to use those allegations now to assert bias on the part

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[1] In their reconsideration motion, Plaintiffs continue to cite the same cases they cited in support of their original motion, namely, *Pierce v. Pierce*, 39 P.3d 792 (Okla. 2001); *Gluth Bros. Constr., Inc. v. Union Nat'l Bank*, 192 Ill. App. 3d 649, 548 N.E.2d 1364 (2d Dist. 1989); *People v. Bradshaw*, 171 Ill. App. 3d 971, 525 N.E.2d 1098 (1st Dist. 1988); and *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988). None of those cases support Plaintiffs' arguments for disqualifying Justice Karmeier. *See* SF Opp. ¶¶ 28, 30-32.

of Justice Karmeier is entirely without merit and unworthy of this Court's consideration.

5. The due process cases cited by Plaintiffs in support of their reconsideration motion (Pl. Reconsideration Mem. at 10-12) add nothing new to Plaintiffs' arguments. None of those cases involved factual situations relating to contributions to judicial campaigns.[2] Those cases do not support Plaintiffs' erroneous contention that Justice Karmeier can be deemed to have an improper interest in the outcome of this case because of contributions made to his campaign or because of any other circumstance alleged by Plaintiffs.[3]

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[2] *See* Pl. Reconsideration Mem. at 9-11 (citing *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (holding unconstitutional a Minnesota statute prohibiting judicial candidates from expressing their views on legal issues); *In re Murchison*, 349 U.S. 133 (1955) (holding that judge who served as "one-man grand jury" could not impartially preside over contempt hearing arising out of grand jury proceeding); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (statutory provision that money collected as civil penalties for use of child labor be returned to Department of Labor did not create risk of bias on the part of those enforcing and administering act); *Tumey v. Ohio*, 273 U.S. 510 (1927) (right to impartial tribunal violated where mayor serving as judge received fees only for convictions, not for acquittals); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972) (right to impartial tribunal violated where major part of village income consisted of fines and fees from proceedings in which mayor sat as judge); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (right to impartial tribunal where justice was pursuing own lawsuit that would be advanced by rulings at issue); *Cox v. Louisiana*, 379 U.S. 559 (1965) (statute prohibiting picketing near courthouse was constitutional)).

[3] Plaintiffs in their motion contend that Justice Karmeier should recuse himself in this case because Justice Maag indicated that he would do so if he had prevailed at the polls. *See* Pl. Mot. ¶ 11. Justice Maag would have had to recuse himself because he was the author of the opinion under review. The fact that Justice Maag would have recused himself for that reason does not support and has no bearing on Plaintiffs' improper attempt to disqualify Justice Karmeier.

6. Indeed, far from establishing that this is one of those "most extreme cases" in which "disqualification for bias or prejudice is constitutionally required," *People v. Jackson*, 205 Ill. 2d 247, 276, 793 N.E.2d 1, 19 (2001), Plaintiffs' cases (to the extent they are relevant at all) in fact support the propriety of Justice Karmeier's participation in the decision of this case. For example, *Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295 (5th Cir. 1977), cited by Plaintiffs, confirms the fundamental principle that judicial elections do *not* by virtue of being "hotly contested" create a grounds for accusing judges of partiality or bias. *See id.* at 304-05 & n.10 (acknowledging lower court's findings that judicial candidates "raise money, engage in political oratory, make campaign promises, appeal to various political and racial groups, advertise in the media, and run under political party labels," but that such activities do not provide a basis for "accusing any State Judge of being politically motivated in any decision he might render" and that elected judges "decide their cases freely and impartially based on the law and the evidence"). As *Morial* makes clear, what a judicial candidate cannot do is "bind himself to decide particular cases in order to achieve a given programmatic result." *Id.* at 305. Plaintiffs do not (and could not) make any allegation that Justice Karmeier so bound himself.

7. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), also cited by Plaintiffs, makes clear that general views on legal issues that a judge may express during his campaign do not form a basis for recusal or disqualification. As that case states, judicial impartiality "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Id.* at 776. However, a "judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice," or even desirable. *Id.* at 776-78. Thus, the fact that "when a case arises that turns

on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose" does not raise questions as to the judge's impartiality or show "bias against that party, or favoritism toward the other party." *Id.* at 776.

8. Finally, Plaintiffs complain that this Court denied their original motion without issuing a written opinion. It is entirely within this Court's discretion whether to issue a written opinion. In this case, the Court's denial of Plaintiffs' motion without a written opinion speaks for itself as to the lack of factual or legal merit of Plaintiffs' attempt to disqualify Justice Karmeier.

Wherefore, State Farm respectfully submits that this Court should deny Plaintiffs' motion for reconsideration in its entirety.

Dated: March 31, 2005

Respectfully submitted,

/s/ Wayne W. Whelan
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OPPOSITION OF DEFENDANT-APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY TO PLAINTIFFS-APPELLEES' MOTION FOR LEAVE TO FILE MEMORANDUM IN RESPONSE TO APPELLANT'S OPPOSITION TO APPELLEES' CONDITIONAL MOTION FOR NON-PARTICIPATION

No. 91494

IN THE SUPREME COURT OF ILLINOIS

MICHAEL E. AVERY, et al., on behalf of themselves and all others similarly situated,	)	On Appeal from the Appellate Court of Illinois, Fifth District No. 5-99-0830
Plaintiffs-Appellees,	)	There Heard on Appeal from the Circuit Court
vs.	)	for the First Judicial Circuit, Williamson
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	County No. 97-L-114
Defendant-Appellant.	)	John Speroni, Judge Presiding.

OPPOSITION OF DEFENDANT-APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY TO PLAINTIFFS-APPELLEES' MOTION FOR LEAVE TO FILE MEMORANDUM IN RESPONSE TO APPELLANT'S OPPOSITION TO APPELLEES' CONDITIONAL MOTION FOR NON-PARTICIPATION

Defendant-Appellant State Farm Mutual Automobile Insurance Company ("State Farm") submits this opposition to Plaintiffs-Appellees' Motion for Leave to File a

Memorandum in Response to Appellant's Opposition to Appellees' Conditional Motion for Non-Participation of Hon. Lloyd Karmeier. In support of this opposition, State Farm states as follows:

1. In their motion, Plaintiffs claim that "new matters have come to light, which this Court may wish to consider." Pl. Mot. ¶ 7. In fact, Plaintiffs' proposed reply brief adds nothing new that is germane to their motion to disqualify Justice Karmeier. The real purpose of their proposed reply brief appears to be to repeat and expand their improper and unfounded attacks on Justice Karmeier and his election campaign. In particular, as shown below, Plaintiffs' characterizations of State Farm and its employees as "massive" contributors to and "major players" in Justice Karmeier's campaign are unsupported by Plaintiffs' exhibits and are refuted by the public campaign records upon which Plaintiffs claim to rely. Likewise, Plaintiffs' repeated contentions that State Farm has attempted to "buy itself a change in outcome" in this case (Pl. Resp. at 13) and that "any vote by [Justice Karmeier] for State Farm" would be seen as "bought by State Farm" (*id.* at 20) constitute the type of improper allegations that this Court has condemned and stricken from briefs. *See, e.g., Biggs v. Cummins*, 16 Ill. 2d 424, 425 (1959) (striking briefs that contained "scandalous and impertinent material"). In short, Plaintiffs' unsupported and objectionable contentions go far beyond the bounds of zealous advocacy, and their motion to file their proposed reply brief should be denied. *See id.; Ambrosius v. Katz*, 2 Ill. 2d 173, 179 (1954) (disapproving briefs containing objectionable matter).

Plaintiffs' Allegations that State Farm Made "Massive" Contributions to Justice Karmeier's Campaign Committee Are Entirely Unsupported

2. In their proposed reply, Plaintiffs submit examples of contributions that they improperly contend "lend further

evidence of State Farm's massive donations to Justice Karmeier's campaign." Pl. Resp. at 9. These contributions include further, relatively modest contributions from State Farm employees and their spouses to JUSTPAC (the political action committee of the Illinois Civil Justice League ("ICJL")) and/or to Justice Karmeier's campaign committee. *See id.* at 9-10, 15-17. These individual contributions, which range from $200 to $1000, bring the total of contributions by State Farm employees to $7900 — only approximately 0.169% of the nearly $4.7 million raised by Justice Karmeier's campaign committee.

3. Plaintiffs attempt to inflate the amount of contributions supposedly attributable to State Farm by lumping in contributions from two independent companies, PPG Industries and Dana Corporation, and from the law firms Mayer, Brown, Rowe & Maw and Sonnenschein, Nath & Rosenthal LLP, which frequently appear before this Court on behalf of numerous clients. *See* Pl. Resp. at 9, 16-17. Plaintiffs have provided no basis for attributing the contributions by these entities to State Farm. PPG Industries is a publicly traded company, 59 percent of its stock is held by mutual funds, and State Farm is not listed among its major holders. *See* Exhibit A. As to Dana Corporation, Plaintiffs incorrectly assume that Dana is a "major supplier" to State Farm based on their erroneous assertion that Dana makes non-OEM crash parts of the kind at issue in this case. Pl. Resp. at 9. In fact, Dana makes brakes, brake parts, and chassis and engine parts that are not at issue in this case (*see* Exhibit B), and in any event, State Farm as an insurer pays for its policyholders' car repairs – it does not repair cars or purchase car parts. Significantly, the contributions by these unrelated companies and law firms are by far the largest on

Plaintiffs' list of contributions that are supposedly attributable to State Farm.[1] *See* Pl. Resp. at 16-17.

4. Plaintiffs' repeated allegations regarding State Farm's contributions to Justice Karmeier's campaign committee and its purported "extremely close ties" to Justice Karmeier's campaign through the ICJL and JUSTPAC are also debunked by the variety of the businesses and organizations that made contributions to JUSTPAC (and through JUSTPAC to Justice Karmeier's campaign).[2] As these contributions show, State Farm's employees and attorneys were *not* major contributors to JUSTPAC, and JUSTPAC was *not* an "agent" of State Farm.

5. In short, Plaintiffs have vastly overstated the level of contributions in any way attributable to State Farm.[3] Yet even if Plaintiffs' numbers were correct (and they are not), under the consistent weight of authority, campaign contributions made before a judge's participation in a case

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[1] The Illinois State Board of Elections website reveals that Justice Karmeier's campaign committee received many hundreds of other individual contributions from Illinois citizens and small businesses, in amounts ranging from $100 to several thousand dollars. The public record of contributions to Justices Karmeier's campaign committee is available at http://www.elections.state.il.us.

[2] The businesses and groups that made contributions to JUSTPAC include, among many others, Caterpillar ($90,000), Metropolitan Life Insurance Company ($65,000), Pfizer ($25,000), ISMIE ($70,000), CNA Insurance ($31,000), Fisher Scientific ($10,000), Mervis Industries ($10,000), Knapheide Manufacturing Co. ($10,000), El Paso Pipeline Group ($5,000), Cooper Industries ($5,000), Allstate Insurance ($6,000), Bank One ($5,000), Ace American Insurance Co. ($10,000), and Brunswick Corporation ($5,000). *See* Exhibit C hereto.

[3] Plaintiffs do not and cannot substantiate their allegations that State Farm itself made contributions to Justice Karmeier's campaign committee or to JUSTPAC. *See* Pl. Resp. at 3, 6, 12-13, 19.

begins are not grounds for recusal or disqualification. *See* State Farm Opp. to Pl. Conditional Mot. for Non-Participation ("State Farm Opp.") ¶¶ 3, 9-16, 28-29; Painter Aff. ¶¶ 10-12. Plaintiffs provide no authority to support their contention that if a case is pending during a judge's election campaign (even though the judge does not at that time participate), the judge's later participation in the case after the campaign is over somehow creates an appearance of impropriety. *See* Pl. Resp. at 5, 12-13. Indeed, the cases upon which Plaintiffs rely, *Gluth Brothers Construction, Inc. v. Union National Bank*, 192 Ill. App. 3d 649 (2d Dist. 1989), and *Pierce v. Pierce*, 39 P.2d 791 (Okla. 2001), do not (as Plaintiffs claim) "stress the *pendency* of a matter when the contribution or other support is given." Pl. Resp. at 5 (emphasis in original). Rather, these cases address the *pendency* of the matter *before the judge in question* while the campaign is ongoing and at the time contributions by a party or attorney are made. *See* State Farm Opp. ¶¶ 28-30; Painter Aff. ¶ 10.

6. Justice Karmeier's participation in this case, *after* his campaign has ended, does not create even an appearance of impropriety. Plaintiffs' tactics in seeking his disqualification, if successful, would infringe upon the First Amendment rights of State Farm's employees — and litigants and attorneys generally — to contribute and lend support to candidates in judicial elections. *See, e.g., In re Fadeley*, 802 P.2d 31, 41-42 (Or. 1991); Ill. State Bar Ass'n Advisory Opinion on Prof. Conduct, No. 866, at 2 (April 1984) (Ex. A to State Farm Opp.).

Plaintiffs' Allegations that State Farm Was a "Major Player" in Justice Karmeier's Campaign Are Entirely Unsupported

7. Plaintiffs' assertion that State Farm "was more than a contributor — they were a major player in the Karmeier campaign, from start to finish" (Pl. Resp. at 17) is untrue and

not supported by Plaintiffs' exhibits, including the Affidavit of Douglas Wojcieszak that Plaintiffs claim "establishes this fact." *Id.* In particular, this affidavit does not (as Plaintiffs claim) state that Mr. "Murnane [the president of the ICJL] *in concert with State Farm lobbyist/attorney Bill Shepherd* recruited Justice Karmeier to run for the Illinois Supreme Court and managed Justice Karmeier's campaign." *Id.* at 10-11 (emphasis added). The affidavit simply claims that "Murnane said he [Murnane] recruited Karmeier and was leading the election and fundraising activities for Karmeier." Pl. Initial Ex. 1 at ¶ 7.

8. Plaintiffs also claim to provide "additional developments" concerning what they denominate "[t]he Ed Murnane Connection." Pl. Resp. at 10. These purported "developments" include an e-mail from Mr. Murnane dated July 2000, which refers to his having had lunch with some "State Farm folks who are, of course, very class-action oriented these days." Pl. Resp. at 11. How Mr. Murnane's having had lunch with unspecified persons from State Farm in the year 2000 demonstrates State Farm's involvement in Justice Karmeier's 2004 campaign, or could support disqualification of Justice Karmeier from this case in 2005, is not something that Plaintiffs explain – or could explain given that the inference drawn by Plaintiffs is so far-fetched.

Plaintiffs' New Contentions Regarding Justice Karmeier's Campaign Are Unsubstantiated and Irrelevant

9. In their proposed reply brief, Plaintiffs continue their improper attack on Justice Karmeier by raising, for example, the purportedly new "development" that Justice Karmeier "has not disclosed to the Court or the public his ties with State Farm – and those in concert with State Farm." Pl. Resp. at 14. In fact, Justice Karmeier's campaign has complied with Illinois election law in making proper public disclosure of campaign contributions. *See* n.1 *supra*. Mr.

Murnane's support of Justice Karmeier, and the support of Justice Karmeier by the ICJL, the Illinois Chamber of Commerce, and other civic and business groups, are matters of public record. Plaintiffs' suggestion that Justice Karmeier is required to make some further disclosure of matters that are already properly disclosed under Illinois election law is directly contrary to Opinion 93-11 of the Illinois Judicial Ethics Committee. *See* Ill. Jud. Eth. Op. 93-11, 1993 WL 774478, at *2 (Nov. 17, 1993) (Exhibit B to State Farm's Opp.). In that Opinion, the Illinois Judicial Ethics Committee states that disclosure by a judge to parties and/or lawyers that a person appearing before him or her was a campaign contributor "is not explicitly mandated by any rule of the Illinois Code of Judicial Conduct." *Id.* Opinion 93-11 also stresses that in *Gluth*, the Appellate Court "determined that a party had not been deprived of a fair and impartial trial by a trial judge because of an appearance of impropriety," where counsel for the opposing party had served as the judge's campaign manager "even though the judge had not disclosed that fact," which was "a matter of public record." *Id.*

10. Plaintiffs contend that the "totality of the circumstances" in this case somehow combine to create an appearance of impropriety. Pl. Resp. at 2. On the contrary, if the totality of circumstances is considered, it is clear that Plaintiffs have repeatedly, in their submissions to this Court, distorted the facts and drawn unwarranted and unsupported inferences from them. The facts and exhibits upon which Plaintiffs rely do not show any "extremely close ties" between State Farm and Justice Karmeier's campaign, do not show large contributions by State Farm employees to his campaign, and do not give rise to an appearance of impropriety. Plaintiffs' disqualification motion is a transparent attempt to prevent Justice Karmeier from participating in this case, which could result in less than a four Justice majority and no authoritative opinion on the

significant legal and constitutional issues presented by this case.

WHEREFORE, State Farm respectfully submits that this Court should deny Plaintiffs' motion for leave to file their proposed reply brief and Plaintiffs' conditional motion for the non-participation of Justice Karmeier.

Dated: February 9, 2005

Respectfully submitted,

/s/ Wayne W. Whalen

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APPELLEES' MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER THE DENIAL OF CONDITIONAL MOTION FOR NON-PARTICIPATION AND/OR RECUSAL OF JUSTICE KARMEIER

No. 91494

IN THE SUPREME COURT OF ILLINOIS

MICHAEL E. AVERY, et al., on behalf of themselves and all others similarly situated,	)	On Appeal from the Appellate Court of Illinois, Fifth District
Class Plaintiffs-Appellees,	)	No. 5-99-0830, there Heard on Appeal from the Circuit Court for the First Judicial Circuit, Williamson County
vs.	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	No. 97-L-114
Defendant-Appellant.	)	Hon - John Speroni, Judge Presiding.

APPELLEES' MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER THE DENIAL OF CONDITIONAL MOTION FOR NON-PARTICIPATION AND/OR RECUSAL OF JUSTICE KARMEIER

Plaintiffs-Appellees, through all of their attorneys, respectfully submit the following Memorandum in Support of their Motion to Reconsider the Denial of Appellees' Conditional Motion for Non-Participation and/or Recusal of of Justice Karmeier in the decision of this case.

INTRODUCTION

The judicial campaign contributions in this case - extraordinary in so many respects - require a determination of whether the conduct here would cause reasonable persons to question the impartiality and integrity of Justice Karmeier. How does the Supreme Court's one word order ensure that the eventual decision in this matter is fair and impartial? Allegations of judicial impropriety - particularly, the specific allegations made here - affect the public perception of the courts.

I. NEW CAMPAIGN DISCLOSURES MADE BY THE ILLINOIS CAMPAIGN FOR POLITICAL REFORM AND THE SUNSHINE PROJECT FURTHER ESTABLISH THAT JUSTICE KARMEIER'S IMPARTIALITY MAY REASONABLY BE QUESTIONED IF HE IS NOT DISQUALIFIED OR DOES NOT RECUSE HIMSELF FROM PARTICIPATING IN THE *AVERY* DECISION.

After Appellees filed their Conditional Motion for Non-Participation of Justice Karmeier, the full 2003-2004 campaign contributions were disclosed and posted on March 15, 2005. The United States Chamber of Commerce (which filed an amicus brief in support of State Farm in this case) was the largest political donor in Illinois during the 2004 campaign, with almost all of their $2,050,000 in funds going to Justice Karmeier's campaign. *Supreme Court Contributors Rocket to Top of Illinois' Donors List, Fall 2003-2004 Campaign Finance Analysis Posted to ilcampaign.org,* March 15, 2005. (Exhibit "2A"). James Rutrough, State Farm's Executive Vice President and Chief Administrative Officer sits on the Chamber of Commerce's Board of Directors. (U.S. Chamber of Commerce Board of Directors List, Exhibit "2B"). The March 15, 2005 publication also establishes that the Illinois Civil Justice

League was the third largest donor in Illinois politics with over 90% of their funds directed to Justice Karmeier. (Exhibit "2A"). The following quotes from United States Chamber of Commerce President, Thomas Donohue, and Ed Murnane of the Illinois Civil Justice League taken from a *Forbes Magazine* article detailing the plans of the United States Chamber of Commerce to spend $50,000,000 to elect business-friendly judges to state supreme courts across the United States in 2004, coupled with the fact that these entities heavily supported Justice Karmeier's campaign knowing that if elected, he may be called upon to take part in this case which was already pending before this Court, further give the appearance that Justice Karmeier's impartiality might reasonably be questioned:

> . . . business is merely trying to even the score with trial lawyers, who until now have dominated judicial elections and enjoyed a cozy, symbiotic relationship with jurists. We led. We succeeded. Now the money is rolling in from drug companies, heavy manufacturers, large retailers, *insurance companies*, even banks.
>
> –Thomas Donohue
>
> Because the Illinois court is now 4-to-3 antibusiness," [Ed Murnane says], "his group will target the sole state supreme court seat up for election in 2004.

Robert Lenzer & Matthew Miller, *Buying Justice,* FORBES MAGAZINE, July 21, 2003, available at http://www.forbes.com/forbes/2003/0721/064.html (Exhibit "2C").

These quotes coupled with the fact that the United States Chamber of Commerce and the Illinois Civil Justice League were strong supporters of Justice Karmeier's campaign further establish that there exists the appearance of bias and/or the inability of Justice Karmeier to be "impartial" as Appellees pointed out in their Conditional Motion for Non-Participation. Both Thomas Donahue and Ed Murnane laid out a clear objective – elect a business-friendly judge in the form of Justice Lloyd Karmeier. They spent millions of dollars to achieve their objective. Any reasonable person would agree that the *Avery* plaintiffs have a reason to be concerned about Justice Karmeier's "impartiality." This concern and the appearance of impropriety it gives rise to warrants non-participation by Justice Karmeier. *See* ILCS Code of Jud. Conduct, Canon, S. Ct. Rule 61, 62, 63, 67 S. Ct. Rule *62; Pierce v. Pierce*, 39 P.3d 792 (Oklahoma 2001) (judge's impartiality might reasonably be questioned when lawyer makes contribution to judge's campaign, members of lawyers family make contributions to judge's campaign, and lawyer further assists judge's campaign by soliciting funds on behalf of judge during pendency of case before that judge).[1]

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[1] *See also, Gluth Brothers Const., Inc., v. Union Nat. Bank* 548 NE 2d 1364 (2d Dist. 1989) (appearance of impropriety exists when judge has "present and ongoing relationship with the attorney [for one of the parties] while the case [is] still pending); *People v. Bradshaw, 171* Ill.App. 3d 971, 975-76 (1st Dist. 1988), *Appeal den.*, 122 Ill..2d 580 (1988)) (trial judge has obligation of assuring public that justice is administered fairly, because appearance of bias or prejudice can be as damaging to public confidence as would actual presence of bias or prejudice). Indeed, the Supreme Court of the United States has annunciated the standard by which a judge's impartiality might reasonably be questioned in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61 (1988), stating: "recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge."

Given the mountain of evidence detailing State Farm's involvement in Justice Karmeier's campaign in the two briefs filed by Appellees, and the weak rebuttal offered by counsel for Appellants, including the lack of sworn affidavits from Ed Murnane or any other campaign staff rebutting the Appellees' evidence, it should be easy to see why Appellees cannot be assured that Justice Karmeier can deliver "impartiality."

Appellees have established that under the totality of the circumstances, that there is – at a minimum – the appearance of impropriety. A reasonable person would question Justice Karmeier's impartiality, would assume that Justice Karmeier knows of the potential for the appearance of impropriety and bias and would see any vote by him for State Farm as having been bought by State Farm and its supporters. This Honorable Court can assure that justice is served and enhance the public's perception of the judiciary where the appearance of impropriety unquestionably exists by disqualifying Justice Karmeier from participating in the decision of this case. Alternatively, Justice Karmeier can assure that the public perception of the judiciary is enhanced by recusing himself from this case.

II. JUSTICE KARMEIER'S OWN COMMENTS ON THE INTEGRITY, FAIRNESS AND IMPARTIALITY OF THE JUDICIARY, PUBLIC POLICY AND THE INTERESTS OF JUSTICE REQUIRE THAT THE REASONING FOR THE DENIAL OF APPELLEES' MOTION BE COMMUNICATED AND CALL FOR A RECUSAL BY JUSTICE KARMEIER.

Justice Karmeier has, himself, commented on the judiciary and about the negative impact the election may have had on the perceptions citizens have of the judiciary. As established below, the very words and concerns voiced by

Justice Karmeier call for a recusal by Justice Karmeier so that the independence of the judiciary is not questioned.

> *An excellent judge must not only do justice, but must in the process communicate with the participants in such a way that they leave the courtroom with a sense that justice was done.*

Justice Lloyd A. Karmeier, *What's the Measure of Judicial Excellence?*, Ill. B.J., Volume 90, p. 518 (October, 2002). (Exhibit "2D") (*Emphasis added*).

This Honorable Court's denial with no comment of the *Avery* plaintiffs' motion for non-participation of Justice Karmeier in this case has left the plaintiffs without an explanation of whether "justice was done" in this instance. As Justice Karmeier's article in the October, 2002 Illinois Bar Journal suggests, judges must adequately communicate with participants so that they – whether they win or lose their arguments – are assured that justice was served. A denial of a Motion of this magnitude which raises issues that go to the core of due process concerns, without comment, does not meet the standard set forth in the article authored by Justice Karmeier. It also invites impropriety in future elections. Additionally, the lack of any comment and/or decision on the Appellees' request that Justice Karmeier recuse himself from participating in the decision of this case does not meet that standard.

The fact that Justice Karmeier has not publicly stated if he will take part in ruling on this case despite the Appellees' motion for recusal indicates that Justice Karmeier may, himself, be struggling with this issue. Justice Karmeier appears to have hinted at this struggle in his public comments:

> [w]e've come through a campaign that did not lend itself well to the judiciary. We need to

> try to address these issues that arose there .... so the independence of the judiciary is not questioned because of the campaigns judges are required to run.

St. Louis Today, December 7, 2004. (Exhibit "2E").

Comments like these from Justice Karmeier are not surprising, especially when his earlier writings such as the article he authored on "judicial excellence" (Exhibit "2D"), are studied closely:

> An excellent judge must make an intentional and ongoing commitment to decide difficult questions without fear or favor, to treat everyone fairly and impartially, and to assure all involved that he or she is indeed a neutral magistrate . . . .
>
> Judges make decisions that affect the lives and fortunes of those who come before the court. Litigants and all those who are affected by judicial decisions must have confidence in the the intellectual honesty, trustworthiness, sincerity, honor and reliability of a judge. The judge must possess an abiding commitment to fairness and ethical conduct that, at a minimum, includes a pledge to adhere to the law, the Code of Judicial Conduct, and the Code of Professional Responsibility.

Lloyd A. Karmeier, *What's the Measure of Judicial Excellence?*, Ill. B.J., Volume 90, p. 517 (October, 2002). (Exhibit "2D").

Justice Karmeier did an excellent job of describing how integrity, fairness, and impartiality are important factors for excellent judges. Furthermore, Appellees have every reason to believe that Justice Karmeier had these very principles in mind when he campaigned and advertised himself to voters as "honest, respected, and impartial." (*See Campaign Advertisement of Justice Lloyd Karmeier)* (Exhibit "2F"). However, Justice Karmeier's campaign turned into one of the most expensive judicial race in United States history and was over run with special interest money. (*See* print-out of December 26, 2004 article *2004: Illinois Supreme Court race became the country's most expensive judicial race*) (Exhibit "2G"). Indeed, the race turned into something more than Justice Karmeier could have ever imagined, including the heavy involvement of State Farm Insurance Company and its supporters -- the United States Chamber of Commerce, Illinois Civil Justice League, and others.

Given the mountain of evidence detailing State Farm's involvement in Justice Karmeier's campaign in the two briefs filed by Appellees, and the weak rebuttal offered by counsel for Appellants, including the lack of sworn affidavits from Ed Murnane or any other campaign staff rebutting the *Avery* plaintiffs' claims, it should be easy to see why Appellees cannot be assured that Justice Karmeier can deliver the "impartiality" he so eloquently described as a necessary ingredient for being an excellent judge.

A West Virginia Supreme Court Justice who was elected in 2004 in a similarly expensive campaign has come out and announced to the media that he will "entertain" recusal motions in cases involving a large campaign donor. (Exhibit "2H"). Justice Karmeier can do one better by immediately recusing himself from the *Avery* case in order to preserve the public's perception of the Illinois Supreme Court. This is especially necessary, where the election was so highly publicized and where negative public perception about political contributions and elections already exists. Indeed, a

survey conducted by the non-partisan Illinois Campaign for Political Reform found that 85% of Illinois voters were concerned that political contributions influenced the decisions of judges. *Judges and politics aren't really a good mix*, Chicago Sun Times, October 29, 2004 (Exhibit "2I").

III. THE ISSUES RAISED BY APPELLEES' IN THE CONDITIONAL MOTION FOR NON-INVOLVEMENT, WARRANT A WRITTEN OPINION.

In their Conditional Motion for Non-Involvement, Appellees, pointed out to this Honorable Court issues of grave concern to the citizens of the State of Illinois – a party in a case pending before the highest court of this state financing an election of a candidate who would ultimately be in a position to participate in ruling on their case if elected. The fact that this occurred certainly raises the appearance of impropriety, and unquestionably puts a question in any reasonable person's mind of whether Justice Karmeier could be impartial were he not to recuse himself from this case. Absent a written opinion from this Honorable Court and guidance as to the reasoning behind the denial of Appellees' Conditional Motion for Non-Participation this Honorable Court is inviting similar and perhaps more egregious conduct in the future by special interest groups who seek to undermine the judicial system as well as the public's confidence in the integrity and impartiality of the judiciary. For this reason, in addition to asking this Honorable Court to reconsider its denial of their Conditional Motion for Non-Participation also specifically request that this Honorable Court issue a written opinion regarding their decision. Such a written opinion would provide guidance to those who seek to provide support to judicial candidates in the future and would prevent any further future mischief and impropriety. The issue of the fairness of the tribunal is one of Constitutional magnitude. At the very least, the legal reasoning which animates the Court should be set forth for

guidance of future cases as well as to preserve the parties right to further review.

IV. PARTICIPATION BY JUSTICE KARMEIER WILL VIOLATE APPELLEES' DUE PROCESS RIGHTS.

Plaintiff's motion for reconsideration should be granted because Plaintiff's constitutional right to Due Process is at stake. Judicial impartiality toward parties appearing before the court is an essential component of the United States Constitution's guarantee of Due Process.

The United States Supreme Court recently clarified when a judge's partiality in a particular case starts impinging on a party's due process rights. In *Republican Party of Minnesota v. White*, 536 U.S. 765, 775-776 (2002), the High Court held that a Minnesota prohibition against judicial candidates announcing their views on disputed legal or political issues violated the first amendment free speech rights of the candidate. In doing so, the court based its holding on the distinction between bias for or against *a party* to the proceeding, and bias for or against a legal issue. Due process rights of a party are implicated when a judge is biased toward a particular party, not just the issue that they represent. *Id.* As Justice Scalia wrote for the majority, "Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." He continued, "[i]t is also the sense in which... an impartial judge is essential to due process." *Id.*

In the instant case, it is undisputable that Justice Karmeier has a bias not just toward State Farm's legal position, but for State Farm as a party. The primary reason that Justice Karmeier would be biased for State Farm in particular is the connection between Justice Karmeier's

campaign and State Farm which was discussed at length in Appellees' initial briefing on this issue.

Second, the fact that Justice Karmeier will be participating in a review of an appellate decision written by his opponent in the election, Justice Gordon Maag, directly implicates the potential for active bias *against* this Plaintiff specifically. The Maag-Karmeier race was described as "raucous," "bitter," "vicious" and "nasty." How can one be sure that should Justice Karmeier decide to reverse both lower courts, his doing so would not be a manifestation, either conscious or subconscious, of his resentment and anger at his opponent in the most expensive, bitter and nasty judicial campaign in our nations history? Plaintiff advances the argument that one could never be certain.

This implicates Plaintiff's Due Process rights, as Due Process analysis goes even deeper than actual bias. Due Process considerations are present not just where bias may exist for or against a particular party, but where there is the mere appearance of or potential for such bias. The impartiality guaranteed to litigants through the Due Process Clause adheres to a core principle: "[N]o man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S.133,136 (1955). Supreme Court cases have "jealously guarded" that basic concept, because it "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico. Inc.*, 446 U.S. 238, 242,100 S.Ct.1610. The Court applied this principle in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), where it held that due process was violated where a judge received a portion of the fines collected from defendants whom he found guilty. The Supreme Court found that this arrangement gave the judge a "direct, personal, substantial[, and] pecuniary interest" in reaching a particular outcome and thereby denied the defendant his right to an impartial arbiter. *Id.*, at 523.

The High Court, in *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), extended *Tumey's* reasoning, holding that due process was similarly violated where fines collected from guilty defendants constituted a large part of a village's finances, for which the judge, who also served as the village mayor, was responsible. Even though the mayor did not personally share in those fines he "perforce occupie[d] two practically and seriously inconsistent positions, one partisan and the other judicial." 409 U.S., at 60, 93 S.Ct. 80 (internal quotation marks omitted).

The High Court applied the principle of *Tumey* and *Ward* to *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, (1986). *Aetna* invalidated a ruling of the Alabama Supreme Court written by a justice who had a personal interest in the resolution of a dispositive issue. The Alabama Supreme Court's ruling was issued while the justice was pursuing a separate lawsuit in an Alabama lower court, and its outcome "had the clear and immediate effect of enhancing both the legal status and the settlement value" of that separate suit. *Id.*, at 824. As in *Ward* and *Tumey*, the Court held that the justice therefore had an interest in the outcome of the decision that unsuited him to participate in the judgment. 475 U.S., at 824. It did not matter not whether the justice was *actually* influenced by this interest; "[t]he Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Id.*, at 825. (internal quotation marks omitted).

These cases establish three basic propositions relevant to determining when impartiality affects due process rights. First, a litigant is deprived of due process where the judge who hears his case has a "direct, personal, substantial, and pecuniary" interest in ruling against him. *Id.*, at 824, (internal quotation marks and alteration omitted). Second, this interest does not need to be as direct as it was in *Tumey*,

where the judge was essentially compensated for each conviction he obtained. The interest may stem, as in *Ward*, from the judge's knowledge that his success and tenure in office depend on certain outcomes. "[T]he test is whether the ... situation is one 'which would offer a possible temptation to the average man as a judge [that] might lead him not to hold the balance nice, clear and true.'" *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). And third, due process does not require a showing that the judge is actually biased as a result of his self-interest. Rather, Supreme Court rulings have "always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. at 136. "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey*, 273 U.S. at 532.;B0233;B0233.

Indeed, States should "properly protect the judicial process from being misjudged in the minds of the public." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965). A State's "interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." *Morial v. Judiciary Comm 'n*, 565 F.2d 295, 302 (5th Cir. 1977). Therefore where even just the probability of unfairness to a particular party exists, as it does here, a party's constitutional right to due process of the law is put at risk. There can be no doubt that should Justice Karmeier fail to recuse himself or be disqualified, the Plaintiffs due process rights would be violated.

V. CONCLUSION

Appellees have overwhelmingly made their case that there is the appearance of bias and that Justice Karmeier's impartiality might reasonably be questioned. The facts which have come to light regarding the donations by the United States Chamber of Commerce and the Illinois Civil

Justice League lend further support to the notion that a reasonable person would question Justice Karmeier's impartiality, would assume that Justice Karmeier knows of the potential for the appearance of impropriety, and would see any vote by him for State Farm as having been bought by State Farm. For these reasons and all of the reasons stated in the Appellees' Conditional Motion for Non-Participation and Appellees' Memorandum in Response to Appellant's Opposition to Appellees' Conditional Motion for Non-Participation, Appellees respectfully request that Justice Karmeier recuse himself; and that if he elects to not do so that he be disqualified from hearing this case pursuant to Illinois Supreme Court Rule 63(c).

Of equal import, this Honorable Court should issue a written opinion regarding the issues raised by Appellees' Motion to provide guidance to those who seek to provide support to judicial candidates in the future and to hinder future impropriety. This motion demonstrates a crisis of confidence in the outcome of this case, which demands an explanation by the court. A lack of an explanation only exacerbates this crisis.

It has been said by Justice Karmeier that ". . . . those who know me know that I have a duty to the people, not to partisan concerns." (Madison County Reporter, Exhibit "2J"). Indeed, Justice Karmeier does have a duty to the people, and his obligation in the *Avery* case is best served by recusal or being removed from the case.

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No. 05-842

IN THE
Supreme Court of the United States

MICHAEL E. AVERY, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent seeks to evade review by this Court on both dubious legal and unsupported factual grounds. State Farm asserts that the recusal decision below comports with Due Process and with the decisions of other cases involving similar claims, but its narrow view of the Due Process Clause has not been adopted by this Court. Respondent's rule, were it the law, would undermine all existing campaign finance laws by holding that there can never be an appearance of impropriety (and therefore no Due Process problem) unless a judge receives a donation while a matter is before her. Respondent's further assertion that the facts of this case do not present the issue raised in the petition is remarkable. Although Respondent made a lengthy submission to the Illinois Supreme Court, it submitted no affidavits or other evidence to challenge Petitioners' factual showing that Respondent and its supporters provided massive support for Lloyd Karmeier's race for the Illinois Supreme Court.[1] If there is any dispute as to

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[1] Respondent not only attempts, without factual support, to deny its contributions to Justice Karmeier, but now categorically claims, for the first time, that "As a matter of longstanding corporate policy, State Farm does not make campaign contributions." (Opp. at 5 fn. 5). However, a quick search of the official Illinois campaign disclosure website www.elections.state.il.us/campaign-Disclosure/contribSearch.aspx shows many thousands of dollars in campaign donations by State Farm and its affiliated companies.

State Farm's assertions are to be contrasted with the affidavit dated January 25, 2005, of Douglas B. Wojcieszak (attached to this reply without the lengthy attached exhibits) submitted below. It is based on his first hand knowledge of the Karmeier campaign and the role that State Farm and certain of its officers, employees and agents played in it. The glaring contrast between this affidavit and the lack of any contrary submissions by Respondent is discussed *infra* at 8-9.

the inferences to be drawn from the uncontradicted facts in the record, the court below never said so, since it never explained its decision.

1. Because Respondent misstates it, we reiterate what Petitioners contend should be the proper legal framework for resolving recusal motions. The standard is not some "absolute," "static", and "hard and fast rule" (Opp. at 26, 28, & 29) requiring that, if a party or its lawyer made any contribution, the beneficiary judge can never sit on a case involving the contributor, as State Farm suggests. Rather, Petitioners contend that a court must examine all relevant circumstances. These include the amount that the party and its lawyers gave in the context of the total amounts raised by the candidate. The amounts spent by any *amici* and their lawyers who are also closely aligned with the party and with the judge's election race are also relevant. The timing of any contribution is likewise significant; recent donations (given while a case is actually pending before the judge or, as here, likely to come before the judge if elected) are treated differently than one given many years before. The absolute and relative size of the contributions are relevant, with large donations from a party in a single election being treated differently from many smaller contributions from the party's lawyers over time. Finally, any other relevant connections between the party and the judge's campaign must also be considered, especially in cases like this one, in which the party and the judge's campaign are shown to be closely intertwined.

It is equally important for state lower courts to understand what they should and should not do when faced with a substantial motion to recuse like this one. First and foremost, a court should not simply say "denied" with no explanation whatsoever; due process requires more than evasion of the issue. Second, a court may not say that campaign contributions, like calories, do not count and can never be the basis for recusal. If that is

the holding below, it surely cannot stand because it would allow a party to "buy" an outcome in a case where a state (like Illinois) sets no limits on campaign contributions. Regardless of what Illinois law allows, such a rule would not assure the "neutral and detached judge" that Due Process requires. *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993).

Petitioners acknowledge that this flexible test, adopted by other courts, provides no bright line answers, but that is the case in most Due Process inquiries. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). If a State has specifically addressed the issue of recusal based on campaign contributions and created specific "legislative controls and ... ethical rules, that weigh and accommodate the competing interests at stake" (Opp. at 26), the Due Process inquiry must give them serious consideration. But it was not permissible for the Justices of the Illinois Supreme Court, to decline to address these issues by ruling, in effect, that campaign contribution can never be the basis for recusal.

2. Respondent's basic claim as to why recusal was not required, and why the cases such as *Pierce v. Pierce*, 39 P.3d 791 (OK 2001), are not in conflict with this one, is that the contributions in this case were made while Justice Karmeier was running for, but before he was elected to, the Illinois Supreme Court. Thus, according to Respondent, unlike *Pierce*, where the contribution to the judge's re-election were made while the case was pending before him, the donations here are irrelevant because the campaign was "not ongoing at the time of [Karmeier's] participation in the case." Opp. at 21.[2] This is the position Respondent took below (Opp. App. 22a-23a, 32a-33a). However, no case *holds* let alone

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[2] *See also* item (i) of Respondent's Question Presented and pages 12-13 & 24 of its Opposition.

implies that judicial recusals cannot be based on first term election contributions. Such a rule would so narrow the class of recusals that it would make the application of Due Process in the appellate context almost meaningless.

Under Respondent's theory, a non-incumbent candidate for judicial office would never have to recuse herself because, by definition, she would never have cases "pending" when the contributions were made. This rule would apply even if the candidate knew that a case was fully briefed and set for argument in the session after the election, or as here where the case had evidently been held over by the court due to the lack of a decisive fourth vote. In short, recusals could only be sought for incumbents who received contributions in their campaigns for re-election while the case was pending. This approach would preclude a Due Process challenge where the case was not yet before an incumbent judge, even if the contributors knew it was likely to be heard right after the judge's re-election. A contribution made while a case is actually pending before the judge may magnify the impact of an otherwise modest contribution, but it is not the sine qua non for disqualification. If it were, the Due Process Clause would be inapplicable to judges in numerous cases where the appearance of impropriety was (as here) clear.

Equally significant, if this approach were followed in the related area of regulation of the size of contributions, it would be almost impossible to defend the existing federal and state laws. As *Buckley v. Valeo*, 424 U.S. 1 (1976) and its progeny hold, contribution limits for officials in the legislative and executive branches of government are sustainable based on the need to avoid the appearance of corruption, and not just actual quid pro quo corruption. But if, as Respondent postulates, the problem exists only if a recipient of a contribution has the current ability to benefit the donor, then the law could constitutionally apply only to incumbents and then only if the donor had a current matter on which the incumbent

had the authority to act. Furthermore, the concerns that animated the "announce rule" struck down in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and the "pledge and promise" rules not at issue there (536 U.S. at 770), were not limited to sitting judges. The proposition that recusal can only be based on contributions made to a sitting judge, regarding a case then pending before her, is not and cannot be the law; and Respondent cannot be correct in its claim that cases such as *Pierce v. Pierce* on which Petitioners rely are distinguishable on that basis.

3. Respondent does not deny that there are very serious problems resulting from the vastly increasing amount of money spent in judicial elections, by lawyers, corporations, labor unions, business associations, and other groups whose members have a direct interest in how elected judges might rule in their cases. Any such denial would be implausible in light of the overwhelming evidence that is described in the *amicus curiae* brief submitted in this case by 12 Organizations Concerned about the Influence of Money on Judicial Integrity, Impartiality and Independence. Indeed, this concern is not limited to the nonprofit organizations that support this petition, but extends to the 39 major corporations that filed an amicus brief in *Dimick v. Republican Party of Minnesota*, No. 05-566, *cert denied*, January 23, 2006. That brief explains in detail how the judicial elections arms race is rapidly accelerating and how election donations are dramatically undermining the appearance of judicial impartiality. Moreover, that brief demonstrates that, while in this case it is the corporate defense side that provided the crucial funding for the judge who cast the decisive vote, in other cases it is lawyers for plaintiffs and labor unions that have financed the election of the judge who will sit on their cases. Thus, as with other campaign finance issues, the concerns are not confined to a single political party, one interest group, or one side of a controversy.

Moreover, the denial of certiorari in *Dimick*, *supra*, heightens the need to consider the proper role for recusal in assuring that judicial elections do not result in the perception of a biased judiciary. Whatever the proper reach of *White* and the free speech protections that the First Amendment affords candidates for judicial office, a backstop is needed if statements by a candidate for judicial office or substantial donations to that candidate suggests the lack of an open mind. In the hopefully rare situation in which the need arises, recusal provides a sensible and effective way to deal with these problems.

Because the Illinois Supreme Court either rejected out of hand the application of the Due Process Clause to recusal motions triggered by campaign contributions, or because it took Respondent's unjustifiably narrow view of when Due Process applies, the decision below not only is incorrect, but it inhibits further recusal challenges, and cannot stand. Review should be granted to correct a serious injustice in this case and to provide guidance to the 39 states that conduct judicial elections and that are therefore likely to be faced with similar issues in the future.

4. Respondent also suggests that requiring recusals will interfere with the First Amendment rights of both contributors and candidates. Opp. at 29-30. To the extent that this claim is based on the assumption that any contribution by a party or its counsel will require the judge's recusal, Petitioners do not urge this Court to adopt any such "absolute" rule. But there is a far more direct solution to this problem that this Court has already approved over First Amendment objections in a series of campaign finance cases, most recently *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003): place reasonable limits on contributions to candidates and political parties and forbid (or significantly limit) corporations and labor unions from making independent expenditures. If Illinois had adopted those measures for judicial elections, this case would not be before this

Court, and the only way that a similar case might arise would be if an individual, such as the Chairman of State Farm, chose to purchase hundreds of thousands of dollars in advertisements supporting a judicial candidate, as he has a constitutional right to do. And if Due Process were to require recusal in such a case, that would be because a court found that disqualification was necessary to prevent the appearance of judge buying, which is a small and entirely constitutional price to pay to assure an impartial judiciary.

5. Respondent also suggests that factual disputes make this case "an improper vehicle" for deciding the question presented. Opp. at 26. However, the undisputed facts underlying the recusal motion make such an argument meritless.

First, the court below did not render an opinion, either on the initial motion or on the post-merits petition for rehearing. Thus, there is no basis to conclude that the facts had any bearing on the decision not to disqualify Justice Karmeier. Indeed, the main thrust of Respondent's opposition to the original motion (Pet. App. 264-275) and on the motion to reconsider (Opp. App. 21a-26a) was that Petitioners' claims were without legal merit. The Illinois Supreme Court apparently agreed because it wrote no opinion, let alone one rejecting Petitioners' claim based on either insufficient facts or disputes regarding them. Respondent did not attempt to factually support the assertions it now makes. In any event, when Respondent attempted below, as it does here, to muddy the factual waters in its brief, Petitioners suggested to the Illinois court that it resolve those alleged factual disputes if it needed to do so in order to decide the recusal motion, *id.* at 18a-19a, but the court never took up that suggestion.

Second, Petitioners' motion was supported by the attached affidavit of Douglas B. Wojcieszak, who had direct knowledge of the workings of the Karmeier

campaign and of the relations between it and State Farm, and its officers, employees and agents. With this affidavit and Mr. Wojcieszak's second affidavit, Petitioners also submitted copies of the publicly available reports showing the contributions made by persons interested in the outcome of this case – either because they worked for State Farm in some capacity, were attorneys for State Farm, were an amicus (or its attorneys), or were organizations in which State Farm had a significant involvement and were supportive of State Farm in this case. Every one of those persons had reason to support the candidacy of Lloyd Karmeier and expect that, if elected, he would support State Farm in this case. The Wojcieszak affidavit was significant because it showed the connections among the various major Karmeier supporters and State Farm, and in particular it explained the vital role played by Ed Murnane, the President of the Illinois Civil Justice League, in connecting the League's financial support directly to both Karmeier and State Farm.

What is most significant is not just the evidence Petitioners submitted, but that State Farm offered none. Of course, State Farm could have chosen to remain silent; after all, it was not the subject of the motion. Instead, perhaps understandably, it decided to stand by its candidate, and replied with a lengthy legal memorandum defending Justice Karmeier's participation. It even filed two affidavits, albeit from persons who had no knowledge of the facts regarding the campaign. Significantly, Respondent chose not to counter the evidence in the Wojcieszak affidavit regarding the key role played by Ed Murnane with one from Mr. Murnane or others with knowledge. Further, while State Farm's Opposition recognizes (at 10) the importance of the showing of the connections of their lobbyist Bill Shepherd to Justice Karmeier, Respondent did not submit one from him either. Thus, there were no real disputes as to the primary facts underlying the recusal motion and hence no

reason not to reach the merits of Petitioners' Due Process claim.

Nonetheless, State Farm asserts that Petitioners offered no evidence that it itself made a contribution to the Karmeier campaign. (Opp. at 5). But as this Court is fully aware, there are many ways in which a supporter can provide financial assistance to a campaign other than making a direct contribution. These include independent expenditures, in kind contributions, and money funneled through third parties. Petitioners' claim in this case is that State Farm financially and otherwise supported organizations that supported the Karmeier campaign and was closely tied to it in other important respects. Pet. App. 299-304. Only because some of that support does not have to be reported under Illinois law, and because other parts are hard to trace, is evidence of huge direct contributions, such as the $1,230,000 supplied by Respondent's *amicus* the United States Chamber of Commerce, the $284,338 from its Illinois affiliate, and the $1,191,453 from JUSTPAC (which as shown by the Wojcieszak affidavit is closely connected to State Farm), lacking for State Farm itself. But that does not mean that the support was missing and the Opposition's carefully chosen words (at 7) do not actually deny that large amounts of State Farm's money in fact went directly and indirectly to support Justice Karmeier.

This reply brief is not the place to redetail all such support and its connection to State Farm, but Petitioners' evidence is more than enough to rebut the claim that, because the record does not show State Farm itself directly contributed to the Karmeier campaign, there is no recusal problem. Again, if only direct contributions to a candidate were relevant, litigants and law firms could simply engage in massive in-kind advertising, and indirect giving through third parties, as was done here, without fear of a recusal.

Petitioners believe that the record is clear that Justice Karmeier should not have sat on this case. To the extent that the connections require more clarity, and if this Court believes the inferences to be drawn from the evidence are not clear, then the remedy is a remand, after this Court addresses the legal issues, so that findings of fact related to recusal can then be made. But before this is done, this Court should lay down the appropriate legal standard that the Illinois Supreme Court and other courts must follow to insure litigants are afforded Due Process when confronted with a privately-financed elected judiciary.

Respondent did not ask the Illinois Supreme Court to make any factual findings in this case, nor did it submit any evidentiary basis to contest Petitioners' submissions. That court did not suggest any need for further factual development before ruling, and neither should this Court. This case is an appropriate vehicle for deciding the important question of how courts should handle the difficult to review yet inevitable Due Process issues that arise when candidates for judicial office receive substantial contributions and other financial support from persons with business before their courts.

CONCLUSION

The petition should be granted.